IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner,

vs.

JOHN G. PASHEA, Respondent.

No. 641

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

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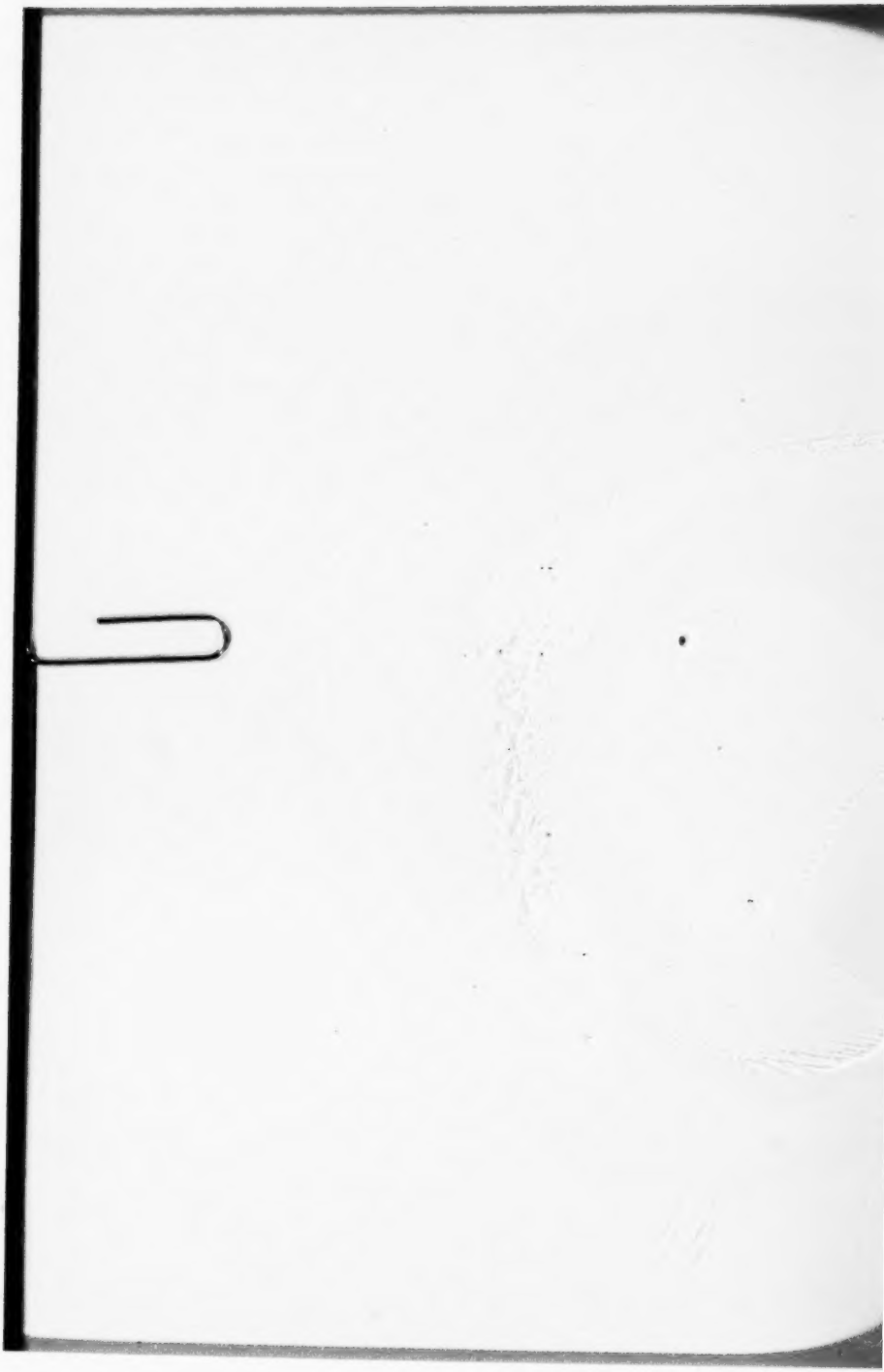

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to the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the Court below), directing it to send to this Court for review its original opinion rendered October 6, 1942, its opinion denying motions for rehearing and to transfer to court en banc, rendered November 10, 1942, by Division No. 1 thereof, in this cause lately there pending, styled John G. Pashea, Respondent, v. Terminal Railroad Association of St. Louis, a Corporation, Appellant, No. 38,127, on the docket of the Court below, affirming a

judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause, in favor of respondent and against your petitioner herein.

Your petitioner further states that it did not present to the Clerk of the Supreme Court of Missouri, en banc, for filing, a motion in said court en banc to transfer said Cause No. 38,127, from Division No. 1 of said court to said court en banc, for the reason that, had it done so, the clerk of said court would have refused to accept or file said motion in said court en banc, as was done in the case of Julia C. Miller, Administratrix of the Estate of Ernest F. Miller, Deceased, v. Terminal Railroad Association of St. Louis, No. 37,976, on the docket of the Court below, and No. 423 of this Court's October Term, styled Terminal Railroad Association of St. Louis, a Corporation, Petitioner, v. Julia C. Miller, Administratrix of the Estate of Ernest F. Miller, Deceased, Respondent.

OPINIONS OF THE COURT BELOW.

The opinions of the Court below on the original submission and on motions for a rehearing and to transfer to court en banc in said cause of John G. Pashea, Respondent, v. Terminal Railroad Association of St. Louis, a Corporation, Appellant, numbered 38,127, in the Court below, which are by this petition sought to be reviewed, appear on pages .... to ...., inclusive, of the printed transcript of the record filed herein. Those opinions have not yet been published in the Official Reports of the Supreme Court of Missouri, but will be found in 165 S. W. (2d) 691.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Sec-

tion 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing for review in this court by certiorari of decisions of the highest courts of the several states wherein a title, right, privilege or immunity especially set up is claimed under a statute of the United States. Authorities sustaining the jurisdiction are: Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. ed. 1062; Minneapolis, St. P. & S. S. M. R. Co. v. Goneau, 269 U. S. 406, 46 S. Ct. 129, 70 L. ed. 335; Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370; Atlantic Coast Line Co. v. Davis, 279 U. S. 34, 49 S. Ct. 210, 73 L. ed. 601; Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. ed. 1512; Seago, Admrx., v. N. Y. Cent. R. Co., 315 U. S. 781; Stewart v. Southern Ry. Co., 315 U. S. 283; Garrett v. Moore-McCormick Company, Inc., et al. (Dec. 14, 1942), U. S. Law Week, Vol. 11, No. 22.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act), 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, to recover from petitioner damages for injuries sustained by him while he was acting within the scope of his employment by petitioner as a brakeman on the rear end of one of petitioner's trains. His claim of injury is that when a stop was made at a grade crossing in the State of Illinois, he was knocked over the rear end of the last car of the train.

Respondent pleaded that "as a direct result of the negligence and carelessness of the defendant, the said train was caused to stop with unusual and extraordinary suddenness and jerk, causing the plaintiff to be violently hurled and thrown from said train" (R. 2, 3).

At the time of respondent's injury about 10 or 10:30 p. m., March 12, 1940 (R. 45, 113, 133), he was riding upon the sixty-third and last car of one of petitioner's freight trains (R. 89), which at that time was moving at a speed of eight or ten miles an hour (R. 69) south or east, depending upon which portion of respondent's evidence is accepted. For convenience, we shall assume that the train was moving south (R. 65, 66). At that time it was raining, "spitting" snow, sleeting and foggy, but the temperature was sufficiently above freezing to prevent the formation of ice on the top of the runway of the car (R. 44).

Petitioner's theory is that respondent was not thrown or knocked off the train; but that after or about the time the train stopped he fell off the north end of the rear car while he was attempting to climb down the end ladder of the car. The facts which support this theory are:

(1) He knew a train was following his train, against the approach of which he had to protect the rear end of his train (R. 45, 47).

(2) The night was dark, and there were sleet, rain and snow falling, and melting as they fell. This condition severely reduced visibility and made footing on top of the car precarious (R. 44).

(3) Respondent had no vision in his left eye (R. 90, 91).

(4) After his fall respondent was lying only about five feet from the wheels of the rearmost car of the train, over the end of which he says he was knocked (R. 68, 96), directly between the rails and about in line with the drawbar (R. 68). In falling he apparently "just cleared the coupler" (R. 97). Obviously he was two or three feet closer to the end of the drawbar than he was to the wheels, as the photograph of the car from which respondent fell, marked "Plaintiff's Exhibit F-1," opposite page 58 of the

record, shows that the wheels are about two or three feet from the end of the drawbar.

(5) The rear end of the last car of the train from which respondent fell moved, if at all (R. 74, 97), not more than a foot or two (R. 74).

(6) The impossibility of stopping the train within a foot or two, even at six or eight miles an hour, is manifest.

As forecast in his petition, respondent testified that there was a sudden and extremely violent stop which knocked him eight or ten feet off and over the end of the last car of his train. He described the occurrence as follows:

> "Q. Now, I want you to explain to the Court and the jury, a little more in detail, just what the effect on you was when that stop occurred. What did it do to you? A. Well, a man generally braces, as well as he can brace himself, and it swung me one way.
>
> Q. Was that towards the front? A. Yes, sir.
>
> By Mr. Sheppard: We object to that as leading, your Honor.
>
> By Mr. Cox: Let me finish the question.
>
> By Mr. Sheppard: No; it is putting the answer in the witness' mouth.
>
> By Mr. Cox (Q.): Was that towards the front or rear? A. Towards the front, because you are braced that way, and then the sudden jerk of the train, the sudden stop, it knocked me off the rear end.
>
> Q. And, with reference to any motion, was there any other motion of the car beside front and back? A. It jerked and swung around, and wrestled around" (R. 60, 61).

On cross-examination he testified that he was standing still on the running board on top of the last car in this freight train, at a point about eight or ten feet from the rear end of the car, holding to nothing (R. 65).

While standing in this position, and without hearing any noise of slack running up or brake shoes grinding against wheels (R. 68, 69, 71), and without feeling any jar, he was suddenly knocked eight or ten feet straight north over the end of the car (R. 68, 69). As he expressed it, the first thing he knew he was off (R. 68); just all at once, and away he went (R. 69); just like the snap of your fingers (R. 71).

Immediately preceding his fall there was neither an increase in speed, and then a stop, nor a stop and then an increase in speed; it just stopped (R. 69). The only thing that happened was a sudden stop (R. 69), when it was moving at about eight miles an hour (R. 69).

He stated further that he was thrown eight or ten feet directly over the end of the rear car of the train (R. 67, 71), not over the side or corner of the car (R. 67), but directly over the end. He landed between the rails of the track over which his train was moving (R. 68), with his head about five feet from the wheels of the car (R. 67, 68), and his feet about five feet seven inches (his height) farther north (R. 68).

The train did not move more than a foot or two, if at all, after respondent fell over the end of the car (R. 74).

When asked if he knew the stop was to be made, respondent replied that he did not know exactly what they were going to do; that sometimes "they pull the whole train and sometimes they don't" (R. 78). The engineer said that was a scheduled stop (R. 125).

Respondent's testimony shows further that at the time of his injury he was facing practically the opposite direction from the movement of the train—facing the rear end of the car over which he fell (R. 66). He does not say that the sudden and violent stop threw him in the direction of the train's movement, or sideways, but only directly contrary to the direction the train was moving and over

the rear end of the car upon which he was standing (R. 67, 68, 74).

Respondent testified that there was "some noise" preceding the jar (R. 64). However, immediately before making this statement, respondent had testified that "there was no warning" of the stop; that "the first intimation" he had received was the "jar, and then I was thrown off. That is the first indication that I got" (R. 64). Later he stated again that he had heard no noise and had felt no jar; that he was just knocked right off (R. 68); that he did not hear that noise which is always produced by the taking up of slack; "it was just that quick—just like the snap of your fingers—and I was on the ground" (R. 71). He stated further that ordinarily one hears the slack being taken up when a train of the length of this one stops suddenly—he had heard it a million times—one who works on a "drag" (as was this one) hears the running of slack every hour of every working day (R. 72), but he did not hear it on this occasion; "it was all at once. It just stopped right now" (R. 72).

Petitioner's evidence shows no abnormal stop was made (R. 103, 121); that before making a stop at St. Clair avenue the speed was reduced to four, five or six miles an hour (R. 102, 117, 133); that when the stop was made it was done by automatic rather than straight or engine air (R. 103, 114).

The basis of the decision of the Court below is thus stated in its opinion:

> "When all of plaintiff's testimony is considered together most favorably to his claim (as it must be in ruling the sufficiency of his evidence to make a jury case) there is substantial evidence to show that the first force applied in the stop did operate in the direction defendant says the law of inertia would operate but that plaintiff was not thrown forward by it because he was braced against it. It does not seem

unreasonable to believe that there would be some jerk back or rebound immediately thereafter from such a sudden stop. It is true that plaintiff said it happened quickly (indicating with a snap of his fingers) but only such a sudden stop would likely have caused him to lose his balance. Therefore, we think it would be reasonable for the jury to find that there was in operation more than a single force in one direction only; that there was a sudden jerk, shake, or rebound as well as a sudden slackening; that the forces applied in bringing the train to a sudden stop operated both forward and backward; and that plaintiff would not be thrown down forward when braced against such a force operating in that direction but could, because of the violence of that force and slick condition of his footing, lose his balance so as to be thrown off the end of the car by subsequently acting forces from those movements which he described as 'buckled,' 'twisted,' 'jerked,' 'swung around' and 'wrastled around.' "

QUESTIONS PRESENTED.

I.

Is respondent's testimony that while riding upon the top of the last car of a train slowly moving south, it suddenly and violently stopped, whereby he was thrown or knocked a distance of eight or ten feet in the opposite direction from the movement of the train, contrary to the law of inertia, and, therefore, nonexistent as a basis for judicial action?

II.

If we assume that respondent's evidence is not contrary to physical law, is it so contradictory as to be self-destructive, leaving his theory without any evidential support?

III.

Is petitioner's evidence of such a conclusive character "that if a verdict were returned" for respondent "it would have to be set aside in the exercise of a sound judicial discretion?"

IV.

May a judgment be affirmed on appeal on the theory that a jury has a right to disregard plaintiff's positive testimony and base its verdict solely upon speculation exactly contrary to his positive evidence? May a plaintiff testify to facts which prevent his recovery, obtain a verdict and have his judgment affirmed upon the theory that although his testimony was insufficient, his judgment will be upheld because the jury had a right to disregard his testimony and find for him upon a speculative theory directly contradicted by his evidence?

The Court below held that although respondent testified time after time that nothing happened except that a violently sudden stop knocked him off the rear end of the train, the judgment would be affirmed on the theory that he was thrown off the car not by the sudden stop (as he stated), but by the rebound from the sudden stop. This rebound theory is nowhere advanced by respondent either in pleading or evidence. With thirty years' experience behind him, it is inconceivable that he would not have so testified if that had been true. Moreover, the sudden stop (the primary shock) must necessarily have been greater than the rebound (the secondary shock). Nevertheless the Court below approved a finding that the primary shock did not knock him down, and the secondary shock knocked him eight or ten feet. In effect, the Court below has held that the rebound of a sledge hammer after striking a piece of iron is greater than the initial blow; that the lesser includes the greater.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

Respondent's claim that he was knocked north by the sudden stopping of a southbound train is based upon a physical impossibility. He did not claim he was first thrown towards the south, although he did say (R. 61), in answer to an extremely leading question, that he was "swung" towards the south; but he said on the same page and only eight or nine lines below: "And then the sudden jerk of the train, the sudden stop, it knocked me off the rear end." At numerous other times during his testimony he said that the first intimation of a stop was when he "was thrown off" (R. 64); he heard no noise and felt no jar, but was knocked "right off" (R. 68); the only thing that happened was that it "suddenly stopped" (R. 69); "it was just a sudden stop" (R. 69); "just knocked off. It was just a sudden stop" (R. 69); "it was just that quick (indicating), and I was on the ground. Just like the snap of your fingers" (R. 71).

It is quite true respondent said: "Well, a man generally braces, as well as he can brace himself, and it swung me one way" (R. 61). But as he was facing the rear end of the train he could not stoop forward to "brace" himself against a stopping shock. If he had done so, when the shock came he would have had to run backwards toward the front of the train. Moreover, how could he have "braced" himself when his first knowledge that there was to be a stop was when he was "thrown off" (R. 64)? He heard no noise, felt no jar, but was knocked "right off" (R. 68). He was asked, "What was the first warning of any kind of this sudden stop that you noticed?" He replied: "There was no warning." If he had no warning of any kind, how could he have realized the necessity for "bracing" himself?

Clearly a sudden stop of this freight train must have thrown him towards the head end of the train, by operation of the uniform and immutable law of inertia. That it did so operate admits of no possible doubt. Respondent's story is wholly wrong.

II.

But if we assume his evidence is not violative of the law of inertia, it is so self-contradictory as to destroy its probative value. He says he heard "some noise" before the jar came (R. 64); he heard "no noise" (R. 68, 69). It "swung" him towards the front of the train, and "jerked and swung around, and wrastled around" (R. 61); he heard no noise, felt no jar, "just knocked me right off" (R. 68); the only thing that happened was that it suddenly stopped (R. 69).

III.

Respondent's evidence is not only contrary to physical law and self-contradictory; but even though it were not, petitioner's evidence is so overwhelmingly destructive of respondent's that this judgment cannot stand. This Court as well as all of the inferior federal courts have held for many years that under these circumstances judgment for respondent cannot be upheld. It is not and never has been the law that a jury may capriciously and arbitrarily base its verdict upon wholly insubstantial evidence merely because it favors a plaintiff, and ignore substantial evidence merely because it favors a defendant. No juror under his oath to try a case on the law and the evidence may disregard evidence which is not inherently unworthy of credit or violative of any physical law, and base his verdict upon a plaintiff's uncorroborated evidence which is opposed by the overwhelming evidence of defendant. If he may, then he does not base his verdict upon the evidence, but upon his prejudice.

Petitioner's evidence shows the freight train was handled in the usual manner; that the air brakes were applied by the customary method; that the speed at the time of the stop was no more than four to six or possibly eight miles an hour; that at such speed there can be no suddenly violent stop, regardless of the use of engine rather than automatic air. This evidence is not denied by respondent.

Consequently, respondent's evidence alone that there was such a sudden stop as to throw him eight or ten feet is wholly incredible, and a verdict based upon it is not and cannot be based upon the evidence, because the evidence will support no such verdict. Therefore, such a verdict must have resulted from prejudice against petitioner.

A verdict is either based on the evidence or it is not. If it is based on the evidence, then if the evidence is overwhelmingly favorable to a defendant, and not inherently incredible or impeached, the verdict will unquestionably be for defendant. If the verdict in such a case is for plaintiff, then inevitably it is not based upon the evidence.

IV.

The opinions of the Court below affirming respondent's judgment are based upon speculation, and are directly contrary to respondent's evidence.

He was a switchman of thirty years experience (R. 42); accustomed to riding on the tops of freight trains; familiar with their jerks, jolts and stops, with the noise of brake shoes being applied to wheels and the running up of slack. He claimed to know, and, moreover, testified to, all of the details of the occurrence. He sought a verdict upon his detailed story of the happening.

It is taken to be axiomatic that no plaintiff will be permitted to recover on a theory directly contrary to or unsupported by his evidence. Nevertheless that is what the Court below approved, basing its action wholly upon speculation.

(1) Respondent said repeatedly that nothing occurred except a sudden stop (R. 68, 69, 71, 72). The Court below said: "It does not seem unreasonable to believe that there would be some jerk or rebound immediately thereafter from such a sudden stop." Of course it cannot be denied that, strictly speaking, there would be a rebound of some degree, but to affect this case it would have to be of consequence. Respondent says nothing about a rebound. Who knows better than he whether or not there was a rebound? How does the Court below know there would be a rebound of any consequence following the stopping of a 63-car freight train when traveling at six or eight miles an hour? How does the Court below know how great such a hypothetical rebound will be? Moreover, respondent says nothing about being thrown off the car by a rebound. In addition, the Court below concedes respondent could not have been thrown over the end of the car (as he says) by the stop, and he says positively he was not thrown in the opposite direction by it. Thus the Court below inevitably finds that the primary shock (the stop) was less severe than the secondary or resulting shock (the rebound); that the upward bounce of a sledge hammer is more violent than the downward striking blow.

(2) The Court below says the jury could have found that "there was in operation more than a single force in one direction." The fact that respondent's evidence is directly to the contrary is a sufficient answer to that hypothesis. His positive testimony is that there was no movement of the train except a violently sudden stop.

It will not be denied that, under proper conditions, a suddenly violent stop of a 63-car freight train may set in operation "more than a single force." In other words, there may be a rebound as well as a sudden stop, provided factors other than just the stopping are present. But the error in the reasoning of the Court below lies in the fact that it cannot possibly know, and, therefore, cannot take

judicial notice under the facts which appear in this record, that a sudden stop would have set in operation a force counteracting the law of inertia, viz., the force which produces a rebound, which would be of sufficient strength not only to have counteracted the law of inertia, but to have completely overcome it and thrown him eight or ten feet in exactly the opposite direction.

In other words, the Court below hypothesized that although the sudden stop was sufficient to throw him somewhat to the south (he denies this time after time), but insufficient to make him fall, yet the contrary acting force overcame the law of inertia to the extent that he was knocked a distance of eight or ten feet and off the end of the rear car.

Two reasons negate such a hypothesis: (1) there is no evidence to support it, and (2) as a matter of physical law it is incorrect.

(3) The Court below says further that the evidence warranted the jury in finding:

> "that the forces applied in bringing the train to a sudden stop operated both forward and backward; and that plaintiff would not be thrown down forward when braced against such a force operating in that direction but could, because of the violence of that force and slick condition of his footing, lose his balance so as to be thrown off the end of the car by subsequently acting forces from those movements."

To these hypotheses there are several complete answers:

(a) There is no evidence to support them.

(b) Respondent had no means of "bracing" himself except by reflex muscular action after he felt the shock. The footing was insecure because of the slickness of the runway; there was nothing for him to lean against or hold to; and, moreover, he said repeatedly he had no warning

whatever that a shock was impending and could not have prepared to counteract it.

(c) The rebound could not possibly have been so violent as the primary force resulting from the shock of the alleged violently sudden stop.

(d) The runway was just as slick (but no slicker) when the primary shock of the stop was felt as it was when the hypothetical secondary shock of the rebound was felt.

Of course, it is possible that some of the things hypothesized in the opinion of the court below may have happened. But that they did happen can be no more than speculation, because the evidence of respondent not only fails to prove they happened, but shows they did not happen.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of John G. Pashea, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that Court's number 38,127, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated November 10, 1942, when its motions for rehearing and to transfer to said Court en banc, shall be reversed; and that petitioner shall have such relief as to this Court shall seem appropriate.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The jurisdiction of this Court is clear.

Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65;

Judicial Code, Sec. 237, as amended by the act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28 U. S. C. A., Sec. 344;

Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. Ed. 1512;

Seago, Adm'x, v. N. Y. Cent. R. Co., 315 U. S. 781;

Stewart v. Southern Ry. Co., 315 U. S. 283;

Garrett v. Moore-McCormick, Inc., et al. (Dec. 14, 1942), No. 67, October Term, 1942, U. S. Law Week. (11 L. W. 4057), Vol. 11, No. 22.

II.

Respondent's testimony that while riding upon the top of the last car of a sixty-three car freight train moving south at about eight miles an hour, there was a sudden and violent stop which knocked or threw him a distance of eight or ten feet directly over the north end of the last car, to the ground between the rails of the track over which the train had been moving, is contrary to the physical law of inertia, wholly insubstantial and insufficient to make a jury question.

Dunn v. Alton R. Co., 340 Mo. 1037, 104 S. W. (2d) 311;

Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215;

Daniels v. K. C. Electric Ry. Co., 177 Mo. App. 280;

St. Louis Southwestern R. Co. v. Britton, 190 F. 316; Rome Ry. & Light Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468.

(a) Moreover, respondent says the train moved only a foot or two, if at all, after his fall (R. 74); and that he heard no noise of slack being taken up (R. 72), and felt no checking of speed, no jarring (R. 72), and there was no intimation of a stop (R. 64), prior to the stop.

This evidence, too, is directly in the face of common experience.

See authorities, supra.

III.

Respondent's own testimony is self-destructive because it is self-contradictory.

(1) He said the first intimation of the stop was a jar and then he was thrown off; that there was some noise (R. 64). He said later in his cross-examination that he heard no noise and felt no jar at all (R. 68). This is, of course, a clear contradiction.

(2) He stated that the train "stopped unusual, and buckled and twisted in every shape" (R. 48). On cross-examination he said he felt no jar (R. 68); the first thing he knew he was off (R. 68); the only thing that happened was that it suddenly stopped (R. 69); it was just a sudden stop (R. 69); "it was just that quick (indicating) and I was on the ground," just like the snap of your finger (R. 71). He said once that the train "buckled and twisted," and five times that nothing happened except a sudden stop. There is no possible way to reconcile these statements.

(3) The Court below says respondent testified he was "braced" when the shock came. That conclusion is based

upon respondent's statement (R. 61): "Well, a man generally braces, as well as he can brace himself." Assuming without conceding that this is sufficient to constitute a statement that respondent was "braced," it is in the face of his own testimony that he was standing on the wet, slippery runway on top of a box car, a picture of which, introduced by respondent and marked "Plaintiff's Exhibit G-1" (second picture opposite page 58 of the record), shows nothing on the top against which respondent might brace himself or to which he might hold, except a brake wheel. But as he was eight or ten feet from the end of the car when the shock came (R. 65), he could neither lean against nor hold to the brake wheel.

The only "bracing" possible then was by reflexly counteracting with his body the shock of the stop. As he was facing the rear end of the car he would have been compelled to lean backward to "brace" himself. The human spine does not admit of an appreciatively backward curvature; whereas leaning forward (towards the rear end of the car which respondent was facing) would have "braced" him in the wrong direction.

Respondent cannot recover when his evidence discloses one state of facts favorable to a recovery and another state of facts which bars a recovery, absent any explanation of the contradiction.

Adelsberger v. Sheehy (Mo. Sup.), 59 S. W. (2d) 644, 647;
Steele v. Railroad, 265 Mo. 97, 115;
Roehl v. Ralph (St. L. Ct. App.), 84 S. W. (2d) 405, 411;
Delorme v. St. Louis Public Service Co., 61 S. W. (2d) 247, 250.

IV.

The opinion of the Court below is based not upon the evidential basis, and contrary to well-known physical laws.

(a) Respondent's evidence is so self-contradictory on vital issues that any conclusion reached upon them cannot be based upon his evidence relating to those issues, but must necessarily be most highly speculative.

(b) The same is true of the statement of the Court below that: "There is substantial evidence to show that the first force applied in the stop did operate in the direction defendant says the law of inertia would operate"; and that "respondent was not thrown forward by it because he was braced against it."

(c) The Court below says further: "It does not seem unreasonable to believe that there would be some jerk back or rebound immediately thereafter from such a sudden stop."

From this statement that Court infers that respondent was thrown forward (but not with sufficient force to produce a fall) and that the rebound from the stop knocked him eight or ten feet in the opposite direction over the end of the car.

The factors which must be considered in arriving at this conclusion appear neither in respondent's evidence nor in that Court's opinion.

(d) The Court below impliedly admits that respondent's testimony does not support its opinion by saying that his story of the happening "was not as perfect a description as might have been made by a professor of English," but it was sufficient to show that there were forces operating in opposite directions.

(e) The Court below said: "It is true that plaintiff said it happened quickly (indicating with a snap of his fingers), but only such a sudden stop would likely have caused him to lose his balance."

Apparently the Court below places upon petitioner the burden of proving that respondent's fall was caused by

something other than the stop, despite the fact that respondent's own testimony proves conclusively that the stop could not have thrown or knocked him north, but unquestionably would have knocked him in the opposite direction.

These conclusions are very highly speculative, and are, therefore, unwarranted.

Gulf, Mobile & Northern R. Co. v. Wells, 275 U. S. 455, 72 L. Ed. 370, and cases cited;

P. R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;

Southern R. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239;

C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041, 1045;

A. T. & S. F. R. Co. v. Toops, 281 U. S. 351, 354, 355, 50 S. Ct. 281, 74 L. Ed. 896, 899.

ARGUMENT.

I.

The jurisdiction of this Court can scarcely be questioned. The three cases hereafter discussed are directly in point. In fact, the only difference between the first two cases and the one at bar is that in those cases the petitions for certiorari were filed by plaintiffs and in the instant case the petition is filed by defendant.

Seago, Admrx., v. New York Cent. R. Co., 315 U. S. 781, was an action under the Federal Employers' Liability Act, which involved only one question, namely, was the evidence sufficient to make a jury question? The Supreme Court of Missouri held that the evidence was insufficient and that the trial court should have directed a verdict for defendant. Upon application, this Court granted its writ of certiorari and immediately upon the granting thereof handed down the following per curiam opinion:

> "On petition for writ of certiorari to the Supreme Court of Missouri, February 2, 1942, per curiam: The petition for writ of certiorari is granted and the judgment is reversed on the ground that there was sufficient evidence of negligence for submission to the jury. The case is remanded to the Supreme Court of Missouri for its consideration of other questions presented on the appeal and for further proceedings not inconsistent with this opinion."

Stewart v. Southern Ry. Co., 315 U. S. 283, involved the one question: whether or not the evidence was sufficient to warrant submission to the jury. Petitioner's decedent was crushed between the ends of two freight cars and killed while in the employ of respondent as a switchman. The Circuit Court of Appeals for the Eighth Circuit held the evidence insufficient to warrant submission to the

jury. This Court issued its writ of certiorari and following oral argument reversed and remanded the case, saying, on page 286:

> "We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

This Court said, on December 14, 1942, in Garrett v. Moore-McCormick Company, Inc., et al., No. 67, October Term, 1942, 11 L. W. 4057, 4058:

> "So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so, raises a federal question reviewable here under Sec. 237 (b) of the Judicial Code, 28 U. S. C. A., Sec. 344 (b)."

II.

Respondent's story of how and why he was injured is directly contrary to the law of inertia, viz., that a mass once set in motion will continue in the same direction and at the same velocity unless acted upon by some other physical law.

For convenience we repeat briefly the basic facts surrounding the incident:

> (1) A sixty-three car freight train moving south (assumed for convenience) at six or eight miles an hour.
>
> (2) Respondent standing on the top of the last car in the train, where the footing was insecure because of rain and sleet and snow which melted as it fell, holding to nothing and leaning against nothing.

(3) A violently sudden stop which threw or knocked respondent north a distance of eight or ten feet, over the rear end of the last car and to the ground between the rails.

(4) He was not thrown or knocked towards the south, the direction of the train movement, although he said once in answer to a highly leading question that he was "swung" towards the south; but did not say he lost his balance at that time.

These statements unquestionably cannot be true. They are equivalent to saying that one riding in an automobile will be thrown over the back of the seat when the automobile stops suddenly; or one standing on the floor of a truck will be thrown over the rear end of the truck rather than towards the cab of the truck.

Respondent stated positively that the train moved not more than a foot or two, if at all, after he was knocked off. This is probably true as it is corroborated by a disinterested witness; but obviously this statement is too utterly fantastic to be credible if we are to accept respondent's story that he was knocked off the car by a sudden stop. This very slight, if any, movement of the train clearly contradicts his statement that he was knocked off the train, but supports petitioner's theory that because respondent had completely lost the sight of his left eye (R. 90, 91), he fell over the end of the car while in the act of descending from the top of the car. No other theory is consistent with respondent's corroborated assertion that the train moved only a foot or two after he fell.

Respondent is, of course, bound by his testimony and cannot seek recovery upon any theory inconsistent with it. He says positively, time after time, that nothing happened except a sudden and violent stop, which knocked him eight or ten feet over the rear end of the car. If, therefore, his testimony is contrary to the law of inertia, the judgment of the court below cannot stand.

He was not leaning against anything; he was not holding to anything; no part of his body was touching anything except his feet, which were on the runway on top of the freight car. It is quite true that he says the train was "in a curve." But his photograph, Exhibit B-1 (second picture opposite p. 54 of the record), shows that at the point of injury and for a long distance south the track was perfectly straight. The only interpretation of his testimony not contradicted by his own photograph discloses that what he meant was that the engine was on a curve, whereas the remainder of the train was on straight track (R. 66). But if we grant that the entire train was on a curve, it makes no difference. Respondent was not thrown from the car by any side-sway, or over the side of the car, or even over a corner of the car (R. 67, 69). He landed between the rails of the track over which the train was running, directly behind the middle of the end of the car and only about five feet away from the wheels (R. 68). Consequently centrifugal force was wholly inoperative.

It is also true that respondent says "a man generally braces himself" (R. 61); he does not say what he means by that. By his own admissions, however, he was not "braced" by holding to or leaning against anything.

The only possible interpretation to be placed upon this language is (conceding for argument only that he meant he was "braced" on this occasion) that he referred to his reflex muscular action after he felt the shock. He repeatedly stated that he had no warning of an impending shock (R. 68, 69), and, therefore, could not have realized there was any necessity for "bracing" himself. One cannot prepare for a wholly unexpected contingency.

Obviously he was not leaning backward towards the north, in the opposite direction from the movement of the train. We know that one standing up on the top of a fast moving train sometimes leans forward toward the front

of the train to counteract the air pressure created by the movement of the train. But no such thing is necessary when the train is moving only six or eight miles an hour. Moreover, had respondent been leaning (braced) towards the south, it not only would not have helped him to maintain his balance, but would have thrown him south more precipitately than had he not been leaning in that direction, because the center of gravity of his body would have been farther south than his feet and farther south than had he been standing straight.

Had he been leaning backwards towards the north (which no one could or would ever do—in the opposite direction from the movement of the train), the center of gravity of his body would have been farther north than his feet and farther north than had he been standing straight. But even so, he would have been thrown south rather than north, although the fact that he was leaning north would, to some slight extent, have counteracted the force of the stop and respondent would probably have moved a shorter distance south than he would had he been standing straight or leaning south. In other words, a sudden stop could not possibly have thrown him north, but would have thrown him a greater distance south had he been leaning in that direction or had he been standing straight, than had he been leaning north. Therefore, it is certain that, while standing on top of the box car with nothing to lean against or hold to, respondent could do nothing, except by muscular reflex action, which could possibly counteract, modify or affect in the slightest degree the law of inertia, and he could not by his own efforts have prevented himself from being thrown south rather than north by the alleged sudden stop of the train.

Consequently, if the law of inertia was to any extent affected, it must have been by unintention and as a result of some other natural force. What natural forces could possibly have affected respondent as he stood there? It is

possible to conceive of but three: (1) the stopping of the train, (2) the increasing of its speed, and (3) centrifugal force. Because the car upon which he was standing was moving upon a tangent rather than a curve, centrifugal force is automatically eliminated. Moreover, had respondent been affected by centrifugal force, he could not possibly have been thrown directly over the north end of the car as he says he was; but he would have been thrown towards the outside of the curve (which, according to his photograph B-1, was not in existence).

Then we have remaining but two possible modifying or interacting forces, viz., (1) the stopping of the train, and (2) the increasing of its speed. Respondent's own testimony eliminates the second (R. 69). Thus, according to both logic and respondent's testimony, the only possible interference with the operation of the law of inertia was the sudden (he says) stopping of the train.

It is true he attempted to say there was some "swaying" of the car; but he repeatedly stated that there was no increase of speed and no movement of the train or car except a sudden stop (R. 69); such a sudden stop, indeed, that the train did not move more than a foot or two, if at all, after he fell (R. 74). But, even if we should concede a "swaying," that fact would not and could not affect our problem, because respondent's very positive testimony is that he fell directly over the end of the freight car and landed between the rails of the track over which the train was passing (R. 67); not over the side or even the corner of the car.

It must be borne in mind, also, that respondent was standing perfectly still on the runway on top of the box car. Consequently the law of inertia was in no wise affected by his intention. If it was modified or counteracted in any manner, it must therefore have been by unintention. Having excluded any intentional act upon his part, as well as any possible "swaying" of the car, any

increase in the speed of the train, and centrifugal force, we are inevitably forced by both logic and respondent's own testimony to the conclusion that the stopping of the train was the only theoretically possible modifying force affecting the law of inertia. Is his story consonant with that law?

Respondent's testimony is that by the sudden stopping of the train he was suddenly thrown north in the opposite direction from which the train was moving. If this testimony is true, then inevitably some physical law other than inertia and which has not yet been discovered, must have been responsible for his fall. This we purpose to demonstrate conclusively.

His own evidence places him standing still on the top of a box car which was moving south (to avoid confusion, we say south rather than southeast or east). He was facing north, northeast or northwest, depending upon which portion of his testimony is considered. In his deposition he said he was facing directly north. On the trial he changed it to northwest. In any event, he was, for all practical purposes, facing the direction opposite to the train's movement. A sudden increase in the speed of the train would have compelled him to move his feet towards the north in order to maintain his balance, otherwise his feet would have commenced suddenly to move south faster than the remainder of his body and, unless he was able to move his feet towards the north fast enough to keep them directly under the center of gravity (his body) he would have fallen towards the north. This is the daily experience of those who ride street cars, busses, or railroad trains. The operation of this physical law is certain, uniform and immutable. But respondent's testimony is that the only force (an increase in the speed of the train) which could have caused him to fall off of the car towards the north (as he maintains he did), not only was not applied, but that exactly the opposite force was ap-

plied, namely, the train was suddenly stopped; and, moreover, stopped so suddenly that it moved only a foot or two, if at all, after he was thrown. Necessarily the stopping of the train would have exactly the opposite effect upon his body. If the train had been suddenly stopped, as respondent says it was, that would undoubtedly have forced him to step towards the south, the direction in which the train was moving, in order to maintain his balance, because, if he took no step towards the south, the sudden stopping of the train would have stopped the southward movement of his feet, whereas his body would have continued to move south and he would have fallen towards the south, and could not possibly have fallen towards the north. Therefore, if he fell north, over the north end of the box car, necessarily the speed of the train must have been accelerated (assuming for argument only that any movement of the train affected his fall in any way). Respondent is emphatic that the speed was not increased, and he cannot now take the opposite position. Unless he was caused to fall by the sudden stopping of the train, respondent cannot recover, because he pleaded and testified that the sole cause of his fall was a sudden stop; and testified positively that there was no sudden increase in speed.

There is no possibility of doubt about these conclusions, and no amount of argument can change the operation of these forces. In other words, the sudden stopping of the train would have applied the controlling force first to his feet, which would have stopped moving south. Then the center of gravity would have been suddenly shifted in the direction in which the train was moving, causing the upper part of respondent's body to move south with proportionate suddenness.

On the other hand, a sudden increase in the speed of the train would correspondingly have applied the controlling force first to his feet, which would have commenced to move

south at a more rapid speed, thereby suddenly shifting the center of gravity of respondent's body north, in the direction opposite the movement of the train, and would inevitably have caused his body to fall towards the north or over the end of the box car—as he says he fell.

The correctness of these conclusions is illustrated perfectly by the result of a sudden application of one's automobile brakes. According to respondent's theory, if he had been standing on the floor of an automobile truck which was moving south, and the driver had suddenly applied the brakes, respondent would have been thrown over the end gate of the truck instead of up against the cab of the truck or through the windshield. Common experience tells us that when one is riding in an automobile upon which the brakes are applied in emergency or which collides head-on with an obstacle, he is thrown through the windshield rather than against the back of the seat (the back of the seat being in this case the north end of the box car). Thus it is demonstrated incontrovertibly that respondent's tale of how he was caused to fall north over the end of the box car is in direct contradiction of physical laws known to and experienced by all of us every day.

The Court below recognized the immutability of these physical laws in Dunn v. Alton Railroad Company, 340 Mo. 1037, 104 S. W. (2d) 311, the facts in which are briefly as follows:

Plaintiff was riding on a train which was going around a left curve from east to north, but that portion of the train upon which he was riding was, for all practical purposes, moving north. Plaintiff left his seat and was walking south (opposite the train's movement) when there was a sudden decrease in the speed, which he claimed threw him south, followed by a sudden increase in speed, which threw him north, and then a jerk, which threw him through a vestibule door out of the car on the inside of a curve.

The Court below reversed the trial court on the ground that plaintiff's evidence was contrary to physical law: that, when the train was moving north, a sudden decrease in speed would necessarily have thrown him north instead of south (as he claimed); a sudden subsequent increase in speed would have thrown him south instead of north (as he claimed); and that centrifugal force would necessarily have thrown him towards the outside of the curve rather than the inside (as he claimed).

The only difference between the Dunn Case and the case at bar is that Dunn's train was moving north and petitioner's train was moving south. The Dunn Case is, therefore, directly in point and is in strict conformity with the physics of our situation.

The Kansas City Court of Appeals in Daniels v. K. C. Elevated Railway Co., 177 Mo. App. 280, passed on the question in a case in which plaintiff claimed that as he was boarding an eastbound street car, and while he was standing on the lower step the car started east before he had time to get into the car. As he was on the south side of the car, he was necessarily facing north. His testimony was that when the car started east with a quick jerk it threw him east with the car, his head to the east, his feet to the west and his body practically parallel with the track.

That court held, following Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215, that plaintiff's evidence was contrary to physical law and was therefore incredible. In the course of the opinion the court said:

> "But if the plaintiff's deliberate account of the matter is clearly contrary to natural law—contrary to what is called physical facts—we will refuse to credit it (Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215). That case finds full application in this one and must control it. If, as plaintiff says, he stepped up on the step, not holding to anything, except his valise and sword, and the car suddenly started forward with a

jerk, it would, of course, have jerked his feet forward and his body would have been thrown backward with his head to the west. In the Sroggins case it was said that 'plaintiff had released her hand hold and without other support than her footing was stepping to the street. How could the sudden starting of the car, when she was in that position, have the effect of throwing her head-first in the direction in which the car was going? The natural result of such start would have been to jerk her feet towards the east and to pitch her body in the opposite direction, . . . The only modifying force that could have given a different direction to her fall would have been her subconscious efforts to counteract the sudden force exerted against her. Manifestly such involuntary and unsupported efforts could not have produced a counteracting force so pronounced as to overcome the impetus given her body in a direction opposite to that it, otherwise, would have taken.'"

In St. L. S. W. Ry. Co. v. Britton (8), 90 F. 316, plaintiff was sitting in a railway coach seat alone and near the aisle. The front trucks of the tender were derailed.

"Plaintiff testified that the train stopped with such a sudden jerk or jolt that she was thrown against the window sill and her left side and back injured. When the train stopped the male passengers got out of the car to ascertain the cause of the stoppage. There were three lady passengers in the coach in which she was sitting. They (with plaintiff) got up, walked to the rear of the coach, and looked out to see if they could ascertain why the train had stopped. In about fifteen minutes the wheels were replaced on the rails and the train started. After returning to her seat, and after the train had started, the motion of the car made her sick. Her illness seemed to increase before the train reached Little Rock, and she received attention from some of the other passengers. On reaching Little Rock she was taken to a hospital, and has been attended by physicians since. She claims that the injury

resulting from her being thrown against the window sill injured her back to such an extent that her lower limbs have become in a measure paralyzed. At the trial she was brought into court on a stretcher, and demonstrations were made to establish the paralyzed condition of her limbs by sticking pins into them in view of the jury.

"As to whether or not the car stopped in a sudden manner, so as to throw her against the window sill, her testimony stands alone, unsupported by that of any other. In addition to the trainmen, who testified that the train stopped by slowing down gradually, nine passengers upon the train also testified that there was no sudden stop, jerking, or jolting of the train. One of the passengers testified that he was looking directly at her when the train came to a stop, and that she was not thrown against the window sill. Another one was writing, and observed nothing unusual until the train stopped. While the burden was upon the plaintiff to establish her injury by a preponderance of the testimony, the preponderance is not determined by the number of witnesses alone; and, were this all, we might not be inclined to disturb the verdict of the jury, who saw the witnesses and observed the manner in which they gave their testimony. But it is apparent, from a consideration of the physical facts, that plaintiff is mistaken. She was sitting in the seat, she testified, facing in the direction the train was going. She was not sitting next to the window, but near the aisle, and a sudden stopping of the train would have precipitated her forward, not thrown her sideways some distance to the window. Sitting where she was, had she been suddenly thrown sideways against the window sill, she would not have been struck in the side and back below the ribs, but much higher up, at or about the shoulders."

The Court of Appeals of Georgia passed on the question in Rome Ry. & Light Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468, wherein plaintiff's petition alleged that he signaled

the motorman to stop the street car, but before the car had come to a complete stop he boarded the step of the front platform; that the motorman had applied the brakes for the purpose of stopping the car, and when he saw plaintiff moving from the step of the car to the platform the motorman released the brakes; that the car "jumped forward, and jerked, knocked and threw the plaintiff off the car," injuring him.

Defendant's demur to the petition was sustained upon the allegation in the petition last above quoted, viz., that the car jumped forward. The Georgia appellate court, in affirming on the ground that it was a statement of a violation of physical law, that merely releasing the brakes of a car would not cause it to jump forward, said:

> "The case rests solely upon the proposition that a release of the brakes caused the car to jump forward with a jerk; a proposition wholly contradictory of the laws of physics and to ordinary experience. Leaving out of consideration external causes, including condition of the track, curves, etc., we dare say that no motorman can impart a jerk to his car by releasing his brakes or by throwing off his current. Jerks and jolts come from throwing on the brakes or the current, active forces that tend to disturb the inertia.
>
> "The only forces tending to propel a car when the current is off are its momentum, and, if the track be downgrade, gravity. Opposed to both of these forces is friction. We will first consider the car to be running on level ground. Here the momentum is gradually expended in overcoming the friction, and the car will slowly stop. The application of brakes increases the friction, so that the momentum is more quickly overcome, and the speed undergoes a rapid reduction. If you release the brakes—i. e., remove the excess friction—you do not add to the momentum. You merely subtract from the friction, and there results not an increase of speed, a jumping forward of the car, but merely a constant, but less rapid, reduction

of speed. If the car is running downgrade, gravity, as well as momentum, is opposed to friction, and may be strong enough to keep the car in motion, and to accelerate it despite the friction. In this case, as in the other, the application of brakes by adding to the friction tends to overcome the forces of gravity and the momentum of the car, and a reduction of speed ensues. If, now, the brakes be released, there may result, not only a diminution in the degree at which the speed is being reduced, but an actual acceleration of the car; but now, as before, there can be no sudden jerk, for gravity, through a well-known law, produces a uniform acceleration. Under these laws of nature of which the court must take judicial notice, a sudden jump or jerk of the car cannot be produced by merely throwing off the brakes. Something else must concur to produce these effects. We are made surer that this *a priori* reasoning is not fallacious by the corroboration of actual personal observation, though the judgment of the court must rest upon the application of the physical laws and not on the personal experience, for knowledge of the latter nature cannot extend the court's judicial cognizance. By experiments personally observed by the writer through the courtesy of a local motorman, he finds that, when the current is not on, the releasing of the brakes does not, whether on level ground or on downgrade, produce any sudden jerk or jump of the car. On downgrade there is usually a smooth gradual acceleration. On level track, by an illusion, the car seems to gain speed when the brake is first released, but closer observation shows that, in fact, there is no acceleration, but only a change from rapid to slow reduction of speed. Thus *a posteriori* we reach the same result to which our *a priori* reasoning led, that it is physically impossible that a release of the brakes alone could have produced the result claimed; and no other cause is shown. We may say, further, that after our minds reached this conclusion we submitted the opinion for verification to the professor of physics in one of the leading technical institutions of the country, and he

says in reply: 'You are entirely correct in your reasonings and deductions as indicated in your paper which I enclose. The laws of physics justify the conclusions you have arrived at.' "

III.

Respondent's testimony is so contradictory and self-destructive as to be wholly valueless.

To avoid repetition, attention is called to sections II, V and VI of petitioner's motion for a rehearing filed in the Court below, in response to which that court wrote a brief opinion reaffirming its original opinion. Both the motion for rehearing and the opinion in response thereto appear in the transcript of the record filed herewith (R. ..).

(a) Respondent's testimony that the stop was so sudden that the sixty-three car freight train moved, if at all, only a foot or two between the time he was knocked off and the time he was picked up by the disinterested witness (R. 74); that he heard no noise of the taking up of slack between these sixty-three cars by this stop so violent that it was made at most within a foot or two (R. 72); that he felt no checking of the speed and no jarring (R. 72), and had no notice of the train's stopping (R. 72), is ludicrously preposterous.

IV.

Examination of the opinion of the Court below, in the light of the record, will demonstrate conclusively that it is based wholly upon speculation and conjecture.

(a) In the first place, respondent's evidence is so self-contradictory, as heretofore shown, that any conclusion reached upon it must necessarily rest upon conjecture. When respondent says in one place that he heard a noise (R. 64) before the crashing stop, and in another that he

heard no noise (R. 68), how can one determine, without entering the domain of conjecture, whether or not he heard a noise prior to the stop? When respondent says in one place that the train "jerked and swung around, and wrastled around" (R. 61), and in several other places that nothing whatever happened except that he was knocked a distance of eight or ten feet directly over the end of the box car (R. 68, 69, 71), how can it be determined, without crossing the border into speculation, whether or not there was any movement of the train other than a sudden stop?

(b) The Court below says:

> "There is substantial evidence to show that the first force applied in the stop did operate in the direction defendant says that law of inertia would operate but that plaintiff was not thrown forward by it because he was braced against it."

This statement is not supported by any substantial evidence in this record. It is quite true that in a single instance respondent said, in answer to a highly leading question of his counsel, that it "swung" him towards the front (R. 61). But he said at numerous other times throughout his testimony that nothing at all happened except that he was knocked directly over the rear end of the car (R. 68, 69, 71). Can the Court below say that respondent was correct in the single instance and incorrect in the several other instances which squarely contradict the one? Any conclusion that he was "swung" south is obviously based exclusively on speculation. It cannot be based on the evidence, because the evidence is directly contradictory.

Nowhere is the rule applicable to this situation better stated than by Faris, J., while a member of the Court below, in the case of Steele v. Railroad, 265 Mo. 97, 117:

> "But when no explanation or excuse for the variance is given, as in the instant case, the matter of the

probative effect of such bald contradictions ought to be left to the court to be passed on as a matter of law. What in such case is there for a jury to pass on? Why should the self-serving statements of today, favoring interest, have more probative weight than the admissions of yesterday against interest? If there be a reason in the whole realm of law or logic making for any such distinction it is inscrutable; especially in a case where, as here, there is no testimony whatever as to the time when and the place where plaintiff stepped upon the north track save and except that of the plaintiff himself. Suppose the action had been upon a promissory note, and on May 23, 1911, plaintiff suing as payee, had solemnly testified that the note had been paid to him in full; but on the next day had gone upon the stand apropos of nothing, and vouchsafing no excuse for his previous testimony, had said the note had not been paid; the inference in such case would be either insanity or perjury; the former of which destroys the competency, and the latter the credibility of a witness (Secs. 2022 and 6362, R. S. 1909). The case presented is not one of a mere verbal discrepancy arising, it might be, from the manner of speech of the witness, but a vital and fatal variance made, so far as the last above quoted excerpt and whole context shows, deliberately."

Why should respondent's statement that he was swung towards the front end of the train have any more probative weight than his repeated statements that nothing happened except the sudden stop, that there was no decrease or increase of speed, that he heard no noise, felt no jar, and nothing whatever happened except a sudden and violent stop which affected him in no other way than to throw him violently eight or ten feet towards and off of the back end of the car upon which he was riding? Respondent can scarcely take the position that he was insane while testifying. There is left, therefore, under the Steele opinion, nothing except perjury to explain his contradictions.

(c) The opinion of the Court below says further:

> "It does not seem unreasonable to believe that there would be some jerk back or rebound immediately thereafter from such a sudden stop."

It is quite true that such a belief is not unreasonable under proper conditions. But what are those conditions? This record does not inform us. Has the length of the train anything to do with it? If so, what? Has the speed of the train anything to do with it? If so, what? Has the condition of the rail, wet or dry, anything to do with it? If so, what? Has the air pressure in the brake line anything to do with it? If so, what? Has the character of the train, whether passenger or freight, anything to do with it? If so, what? Has the weight of the train anything to do with it? If so, what? This record is completely silent upon these possible, and even probable, modifying forces. May the Court below, with no knowledge whatever of the effect of these different factors, base its opinion upon the assumption that under the circumstances here in evidence none of these forces did in any way control or affect the situation, without speculating upon what they were and what their effect was? It might be warranted in assuming that given a particular set of circumstances which covered all of the factors which would bear any relation to the question of rebound, there would be some definite rebound. But the Court below went further than the mere assumption of a rebound, and assumed further that the initial force of the stop would not throw respondent forward with sufficient force to cause him to fall, whereas the rebound would be sufficiently severe not only to cause his fall, but to cause him to be thrown or knocked a distance of eight or ten feet and over the rear end of that train, and so rapidly that respondent illustrated it by snapping his fingers. Respondent does not say that while he was being thrown or knocked that distance he was

running or stepping in an effort to regain his balance. It is only fair to assume, therefore, that he did not take any steps, but was knocked or thrown, as he says, directly off the car, by the primary shock of the sudden and violent stop. The Court below says not by the sudden stop, but by the rebound. He goes to the jury on one theory: the court below affirms upon another and contrary one, i. e., he goes to the jury on the theory he was knocked off by the stop, whereas the Court below affirms on the theory he was knocked off by the rebound produced by the stop.

There can be no possibility of doubt that the force or shock of the stop (primary) was materially greater than the force or shock of the rebound (secondary). To avoid the inevitable consequence of this unanswerable fact the opinion of the Court below says that respondent was "braced" against the primary shock of the sudden stop, but was not "braced" against the shock of the rebound, despite the fact that there was nothing on the top of the car to take hold of or to lean against. The only "bracing" possible then was by means of his subconscious muscular control of his body, and that would necessarily be produced by and follow, rather than precede, the shock. As he was facing north and the train was moving south, the only possible effective manner of bracing his body would have been to lean backwards toward the south. Whether or not he could have done this successfully is most highly speculative, at least in the absence of any testimony as to if and just how it was done. Moreover, in view of respondent's repeated assertions that he had no warning of the impending stop, heard no noise, felt no jar, how was it possible for him to be "braced" in any way? He knew of no necessity for "bracing" himself, according to his own evidence. Even the assumption of the Court below that he was "braced" is speculative, because while respondent did say that "a man generally braces himself," he stated time after time that he had no warning of the coming stop,

heard nothing to indicate a checking of the train's speed, felt no such thing, and did not even feel a jar (R. 68). Did he, or did he not, then, "brace" himself? Could he have "braced" himself even though he had received warning of the impending stop? He knew no facts which advised him that it would be well to "brace" himself. Against what force? And to be applied in which direction?

(d) The Court below says, in its original opinion, that the jury might reasonably have found "that plaintiff would not be thrown down forward when braced against a force operating in that direction, but could, because of the violence of that force and slick condition of his footing, lose his balance so as to be thrown off the end of the car by subsequently acting forces," etc.

We have discussed, supra, (c), the assumption that respondent was "braced." What about the speculation that respondent could "lose his balance" because of "the violence of that force" (apparently referring to the "sudden stop operated both forward and backward") "so as to be thrown off the end of the car"?

In the first place, he does not say he "lost his balance": he says he was knocked or thrown off the car.

The "slick condition of the car" was neither increased nor diminished by the operation of any physical law. It was just as slick (but no slicker) whether respondent was thrown north or south. Consequently, that cannot affect the question.

We have demonstrated that respondent's "bracing" is not supported by the record. Thus he is left standing upon the slick runway of a box car, when (he says time after time) nothing happened except a sudden stop which threw or knocked him eight or ten feet in an impossible direction. But the court below, by the language just quoted, in effect says to respondent:

"You were entirely mistaken when you testified time after time that nothing happened except the violent stop which knocked you off over the end of the box car. You just do not know what happened. You were thrown forward by the sudden stop. You must have been, because physical law demands that result from its operation. You cannot recover upon that theory, however, because you fell in the wrong direction. That testimony of yours cannot be believed. Consequently, you were thrown forward by the primary violence, but did not fall or even lose your balance (so you say), but the secondary force (the rebound) knocked you eight or ten feet over the end of the car."

(e) In its opinion on petitioner's motion for a rehearing the Court below says:

> "Plaintiff's account was not as perfect a description as might have been made by a professor of English, but we think it was sufficient to show that there were forces operating both ways."

It does not require the command of English customarily associated with a teacher of that subject to state that one was thrown south rather than north, under the circumstances shown here. Any grade school student could and would have said so had that occurred. Respondent was a switchman of thirty years experience in riding upon the tops of freight trains, and admittedly has received many jars and folts while so engaged. If he had been thrown forward by the violent stop, he would not and could not have avoided saying so. He was represented by able counsel, who unquestionably would have seen to it that his testimony did no violence to the law of inertia had it been possible for them to have done so within the domain of truth. Moreover, it would have been the most natural thing in the world for respondent to have so stated had it been a fact.

It does not require the training of a professor of English to tell the truth on the witness stand. The strain on credulity is entirely too great to think that respondent ignorantly or unintentionally failed to say that he was given an extremely powerful impetus towards the south by the stop which he described as "terrific," such a stop as he had experienced but six or seven times in his thirty years service as a switchman (R. 48). As Judge Faris said in the Steele Case, supra:

> "The case presented is not one of a mere verbal discrepancy arising, it might be, from the manner of speech of the witness, but a vital and fatal variance made * * * deliberately."

(f) In the concluding paragraph of the original opinion of the Court below it is held that under this record the trial court had no right to instruct peremptorily for petitioner, as the jury had a right to pass on the questions of fact involved. Under the state of this record, this holding is manifest error, as there were no questions of fact raised by the evidence. If this case must be submitted to a jury, then there can never be an instructed verdict against any plaintiff.

It seems to have been the theory of the Court below that because all of the facts showed that respondent was in some manner knocked or fell from the car, the jury had a right to surmise or speculate that it was from petitioner's negligence, even though respondent's evidence failed to establish it. Note this language in the opinion:

> "It is true that plaintiff said it happened quickly (indicating with a snap of his fingers) but only such a sudden stop would likely have caused him to lose his balance."

Apparently the Court below took the position that because respondent stated his conclusion that there was a

sudden stop, every other possible cause for his fall from the car was excluded, despite the fact that his testimony showed conclusively that the stop did not cause the fall. Necessarily, if it is to be assumed that he was knocked off by some force over which he had no control, and petitioner had control; and in addition that the jury may disregard his testimony and may arbitrarily suppose that he did not accidentally fall, then a plaintiff is not under any duty to prove his case at all, and the defendant is completely helpless.

This is not the rule of this Court, which holds that "where the evidence is undisputed or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party." Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597; Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; P. R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; Southern Ry. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239.

This Court discussed the rule at length in Chesapeake & Ohio R. Co. v. Martin, 283 U. S. 209, 215, 216, 217, 75 L. Ed. 983, 987, 988, where it is said:

> "In the face of this record the conclusion of the court that it was still open for the jury to say that not eight days merely, but twenty days, fell short of being a reasonable time for delivery is so clearly erroneous as to cause the ruling of the court, in effect, to rest upon nothing more substantial than the power of a jury arbitrarily to disregard established facts.
>
> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of

view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

"It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary."

It is submitted that because the evidence of both respondent (R. 74) and petitioner (R. 96) shows that the train moved, if at all, only a few feet (respondent says only a foot or two, if at all), after he fell, that may be accepted as a fact. If so, then respondent's story of this happen-

ing cannot be true, because everyone knows a sixty-three car freight train, moving even as slowly as six to eight miles, cannot be stopped within that short distance. Therefore, the conclusion is inescapable that petitioner's theory of this occurrence is very highly probable, viz., that respondent waited until his train had stopped or had practically stopped, started to climb down the ladder on the north end of this box car, and, because he was blind in one eye, and the footing was slick and insecure, stepped over the end of the car as he approached the ladder which led from the top of the car to the ground. This theory does no violence to the evidence that the train moved only a foot or two after his fall; his own theory and that of the Court below (though contradictory to each other) do severe violence to his corroborated evidence (and the only portion which is corroborated) that the train moved only that distance, if at all, after the stop knocked him off the car.

In conclusion, petitioner submits that this record places no responsibility upon petitioner for respondent's unfortunate injury; the opinion of the court below is manifestly erroneous, and should not be permitted to stand.

Respectfully submitted,

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(27)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,
vs.
JOHN G. PASHEA,
Respondent.
No. 641.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Cases Cited.

Statutes Cited.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Supreme Court of Missouri in the case of John G. Pashea v. Terminal Railroad Association of St. Louis, which petitioner (defendant in the state courts) asks this Court to review on certiorari, has not yet been published in the official Missouri Reports. It is reported in 165 Southwestern Reporter (2d), at pages 691 to 696, inclusive. It is set forth in the record **in this court** at pages **172** to **180**, inclusive, and (on rehearing) on pages 230 to 231, inclusive.

II.

CHARACTER OF THE PASHEA CASE.

1. Pashea sued petitioner under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) for damages for injuries received when he was precipitated from his working station upon one of petitioner's cars by reason of a negligently sudden and violent stop of the train.

2. The petition charged that "* * * because and as a direct result of the negligence and carelessness of the defendant, the said train was caused to stop with unusual and extraordinary suddenness and jerk, causing the plaintiff to be violently hurled and thrown from said train, seriously and permanently injuring him * * *." The answer was a general denial.

3. The only issue in the Missouri Supreme Court was whether the evidence made a case submissible to the jury.

III.

QUESTIONS PRESENTED BY PETITIONER.

In this Court petitioner's contentions are reducible to one, namely, that the evidence was not sufficient to justify submission of the case to the jury.

Severally, they are: 1. That respondent's testimony was contrary to physical law; 2. that respondent's evidence was so contradictory as to be self-destructive; 3. that **petitioner's** evidence was "of such a conclusive character" that, as a matter of law, the verdict should have been set aside; 4. that the opinion of the Supreme Court of Missouri amounts to an approval of a verdict and judgment based solely upon "speculation."

IV.

THE FACTS.

1.

Inadequacy of Petitioner's Statement.

Petitioner's statement of facts is, in our opinion, inadequate. Doubtless by inadvertence, (1) it omits essential facts, (2) incorrectly assumes that all the evidence is in the record, (3) contains what we believe to be inaccuracies, and (4) does not present vital evidence which appeared to the jury and trial court. In conformity to this Court's rule that a statement of facts here must contain all that is material to the consideration of questions presented, we submit the following statement for respondent. The nature of the issue here requires a full statement.

2.

Respondent's Statement of the Facts.

Petitioner's limitation of the issues in this court amounts to admissions of many things. It admits that respondent was, at the time of his injury, in petitioner's employment, as a brakeman, and was at his work, in line of duty, in interstate commerce, on top of the rear car in a sixty-three car train or "drag" (R. p. 44), and was precipitated, in some way, from his working station on the rear car, to the ground and so seriously injured that the amount of the judgment is not excessive.

The record shows the injury occurred March 12, 1940. Respondent had been working for petitioner since August 17, 1909, except for a brief time in 1920.

The night was bad. It was "raining," "dark," "spitting snow, sleeting and there was some fog." "It was as wet as though it was raining; it was misting all evening" (R. p. 45). It was a dark night, "Misty, rainy, smoky, black night" (R. p. 98). Petitioner's engineer at the

time of the injury said, "It was rainy and foggy," and that he "couldn't hardly see." The running board on top of the rear car was wet. "It was too wet to sit down" (R. p. 87).

Respondent's work was "to protect the rear end" of the train on which he was working "from anybody running into us" (R. pp. 44, 45). He was "stationed" there (R. p. 44). So says Benson, the head brakeman at the time (R. p. 100). So says Boyer, the engineer at the time (R. p. 113). Respondent got upon the top of the rear car, with his lantern, "up at the Wabash stop," when he saw the "hot shot" (a fast train hauling perishable goods) "coming around" (R. p. 47). As rear brakeman, respondent's assigned position was **on top of the rear car,** and that was the universal practice at all times in such circumstances (R. p. 60).

Respondent had no duty at all concerning the air brakes at any time (R. pp. 44, 45). Petitioner's head brakeman (Benson) said he had nothing to do with them and didn't know whether they all were connected. He testified that all matters pertaining to brakes are "left to a man that is specialized in that field" (R. p. 106). Benson had been railroading since 1903. The "specialist" did not testify.

The crew of the train in question consisted of respondent, the rear brakeman, Benson, the head brakeman, Boyer, the engineer, Lotz, the foreman (or "conductor") and Porterfield, the fireman. Every one who was asked about the other members of the crew answered correctly as to names and functions except the engineer, Boyer. Boyer became confused (R. p. 113), hesitated, and then named **Hargis** as fireman that night (R. p. 113). The fireman was **Porterfield** (R. pp. 142, 143). It was not Porterfield's "regular" run. He was "only an emergency man at that time." "Was furloughed at that time." He testified on direct examination by Mr. Sheppard that he was on the engine "when all this took place," but didn't

know "anything about it; * * * only what I was told" (R. pp. 142, 143).

Boyer, the engineer, was 55 years old (R. p. 121) at the time his deposition was taken March 14, 1941 (R. p. 111), just one year and two days after respondent was hurt. He, Boyer, **"went to work" for the petitioner in** February, 1910 (R. p. 121), he said, and then said he had been an engineer "off and on" since 1912, but is "back firing sometimes, and an engineer whenever I can" (R. p. 122), but "am a regular engineer now." He "acted" as a fireman about three years, "in the summer of 1933, 1934 and 1935," and had been regularly employed as an engineer since (R. p. 122). He testified he had been on the run in question "since March 1, 1940," **just eleven days before respondent was injured** (R. p. 124, at bottom).

He testified further that his deposition was being taken at his home because of his **illness.** Then (R. p. 123) this followed: "What is the nature of your illness? A. Well, **just nerves, and I can't walk good.**" He said he had been suffering from his ailment a good while and had been "off work" four and one-half months. He also testified his illness (R. p. 122) "had been **gradually coming on**" (R. p. 123).

He further testified:

> "Q. How long had you noticed that gradual development of your physical condition? A. About a year. Q. So that, on **March 12, 1940**" (the date of respondent's injury) "you were not in the best of health? A. No. Q. You were under a doctor's care **at that time**" (the date of respondent's injury), "Mr. Boyer? A. Yes. Q. What was your doctor's name? A. Dr. Harry Kline. Q. * * * **Had you been under his care for some time?** A. Yes. Q. But you had been working regularly? A. Yes" (R. p. 123).

At the time respondent was hurt nobody except Boyer, the sick engineer, and Porterfield, the substitute fireman

(who says he "didn't know anything about it"), was on the engine. Benson, the head brakeman, was on the ground thirteen car lengths **back** of the engine (R. p. 102). Lotz says he was not on the engine at that time (R. p. 138). Respondent's station was on the rear car and he was there. Boyer is the only man, except respondent, who was then on the train at all, excepting Porterfield, who was on the engine, but gave no testimony as to the stop (R. pp. 142, 143).

There were three "regular stops" between Madison and East St. Louis. Respondent testified that two "regular stops" were made before he was hurt (R. p. 46) and the next "regular" stop would be at St. Clair avenue (R. p. 46).

There was adequate evidence that there was a stop for "not very long" before the locomotive crossed St. Clair avenue (R. pp. 78, 79). It was "about a regular stop" (R. p. 79) in character. Respondent was not hurt there (R. p. 79). The train then started up again (R. p. 79) and ran about fourteen car lengths (about 560 feet) before respondent was hurt (R. pp. 79, 83). There was evidence that the train had attained a speed of eight, ten or twelve miles an hour when respondent was hurt (R. pp. 101, 69, 117, 133).

Roach, appellant's first witness, a railroad man, not an employee of petitioner, was first to reach respondent after the latter was hurt. He testified that respondent was lying between the rails, **four or five feet from the rear end of the rear car** (R. p. 96, at bottom). Other evidence showed that respondent's head was nearest the car, and his feet farther away (R. pp. 61, 62, 67).

When respondent was injured the train was in a considerable "or rather steep" curve, so Benson, the head brakeman, testified (R. p. 109). So says respondent (R. pp. 61, 66). In fact, the curve through which the train was then passing was such that the train, though headed

east before it reached the curve, yet after it "made the curve," was headed **south** (R. pp. 109, 47).

Boyer, the engineer (R. p. 130), testified:

> "Q. So when you take a long train, if you brake it by using the 'straight air' ('engine air'), why, **the rear cars would have a tendency to sorta whip**—— A. (Interrupting) **Yes.**
> Q. ——**and swing around?** A. **Yes.**"

There is adequate evidence that the effect of an "engine air" stop (in fact, any violent stop) is to make the rear car "buckle and twist" (R. p. 48) and "jerk and swing" (R. p. 61), and that effect is greater on a long train than a shorter one (R. pp. 61, 108). Lotz, the conductor, said that a "dynamiter" would make rear cars "buck and jump a little bit," **but "not like stopping the train with an engine"** (R. p. 140), i. e., with "engine air" brakes. Lotz also testified that if a long train is stopped with "automatic air" (train air) **"all cars stop almost simultaneously"** (R. p. 138).

The nomenclature used in testifying about air brakes is to be kept in mind. "Engine air" is, also, varyingly called "straight" air or "independent air" (R. p. 107). "Engine air," under either name, "puts the brakes on the engine and tank" (tender) only, and "not on the cars" (R. pp. 89, 118). "Automatic air" is where the air brakes all along the line of the train are coupled up and used to stop (R. p. 118). That is also called "train air" (R. p. 105, at bottom), or "train line air."

Benson, petitioner's head brakeman, testified that "if the engineer makes a sudden application of the **'engine air,' that simply glues the wheels of the tank and the engine to the rails and stops them** * * * and that is a sudden jar of the train, * * * providing you are going at that kind of speed" (R. p. 107). Benson then testified:

"Q. You mean the stop at St. Clair? A. Yes, sir; we made our permanent stop and took our head end; he applied train air.

Q. **You say he used 'train air' on a long train to make a stop?** A. **'Engine air'** " (R. p. 110).

(This was the stop which hurt respondent [R. p. 61].) The controversy about stops is whether the train stopped momentarily before reaching St. Clair avenue, or merely slowed down (R. pp. 76, 102). There is adequate evidence that respondent was hurt when the stop was made after the engine crossed St. Clair avenue (R. p. 81, respondent, and p. 103, Benson). That stop was the one made for the cutting off of the head thirteen cars. Respondent testified the stop was from the application of "straight air," the same as "engine air" (R. p. 48), and testified to its effect and to a long service (over thirty years) and to experiences of an unfortunate nature involving stops of a violent nature from the use of "engine air" (R. p. 88). Lotz testified that the "slow down" he says was made, **"the first time,"** was made with "engine air," but that he was not on the engine when the stop which hurt respondent was made (R. p. 141), and that Boyer was "wrong if he said he never applied 'engine air' at all" (R. pp. 140, 141).

"Q. You saw him apply it? A. Yes, sir."

Benson, the head brakeman, first testified that the stop was made with "automatic air" (or "train air") and described in detail how he had **reasoned it out** that it was "automatic air" (R. pp. 103, 104), but later (R. p. 110) he testified, on redirect examination, that it was made with **"engine air"** (R. p. 110). Lotz testified (R. p. 138) that the longer the train is, if a stop is made with "straight air" (engine air), "you run more slack in, as a rule, up against the engine, and if the stop is made with **"automatic air"** (train air) **"all cars stop almost simultane-**

ously'' (R. p. 138). He further testified that there wouldn't be "a very severe jolt" if the train was moving at six miles an hour, upon the application of "engine air," but "as you increase the speed the jolt gets harder" (R. p. 138). (There is evidence that the train was running eight, ten or twelve miles an hour when the violent stop was made. The rate was for the jury.)

Lotz also said that the "behavior of the rear car on a train as long as this would depend upon the load in the car and the condition of the track" (R. p. 139).

The record shows that in describing "jolts," and the like, from using air brakes, appellant's witnesses were describing "careful" stops (R. pp. 110, 105). Appellant's witness Benson said that from his experience since 1903 (in petitioner's service) he knew that **"as a matter of fact,** you cannot tell each time what you are going to get back there; they" (the rear cars) "act one way at one time and another at another. **But it is a dangerous practice for an engineer to stop suddenly, when he has to brake, because of the cars in the rear"** (R. p. 108). "Dynamiters" appear in the record as **themselves the cause of dangerously sudden stops.**

Benson, the head brakeman, testified he had been railroading since 1903 (in appellant's service) and felt "pretty much at home in that service." He testified that a **"dynamiter is a car that has a dirty triple valve;** they have **corrosion on them,** and that is why the Interstate Commerce Commission, the National Government, **requires they go through them"** (the air brakes on the cars) **"often and clean them out,** and when those tin plates have this corrosion, I cannot explain it clear, but they will cause some kind of combustion in there, that will cause your brakes to stick, **and it may cause your entire train to do a quick action,** but a dynamiter **is a dirty triple valve''** and **"so if there's a 'dynamiter'** on the train and the 'train air' ('automatice air') **is applied, you have a**

very sudden stopping, and any cars back of it" (R. pp. 106, 107). The "specialist" and "inspector" of air brakes for appellant was not called as a witness (R. p. 106).

Lotz said (R. p. 140) that a dynamiter "would cause the cars back of it **to buck and jump** a little bit," but **"not like stopping the train** with an engine" (R. p. 140) (engine air).

Respondent testified (R. pp. 89, 90) that on a "dynamiter" "the air sets on the car much quicker than any of the rest of them, and it will cause much the same thing (as an 'engine air' stop), if not worse, on the rear end." "It is a peculiar condition in one particular car that sets the brakes on that particular car quicker than the others." Benson (R. p. 110) finally testified that the jars and jolts depend upon **"who operates the engine." In this case Boyer was operating it.** His condition is described heretofore in this "Statement." He was, at the time, suffering from a "nervous" disorder. Benson further testified that "an engineer **can** take and use a brake, an engine brake, **by being careful,** on a speed of ten miles an hour and never jar his train anywhere along his entire train" (R. p. 110). **"It depends on who operates it"** (R. p. 110). A proper stop is made by cautious, and gradual, and successive light applications of the brakes (R. p. 107, at bottom, and pp. 104, 105).

Boyer testified (R. pp. 130, 131) that there was never "at any time" anything "that loomed up in front" of him that caused him to "make any sudden stop," and "no stop was made on that run as the result of anything suddenly appearing in front of" the train. He said that "there was no emergency stop made at all" (R. p. 131).

Respondent testified that at the time he was thrown from the rear car he was standing on top of the car (its running board) "only eight feet from" the rear car's rear end (R. p. 70). He described the place of the stop and, as

to its character, testified that the "train was stopped all of a sudden with a **terrific stop.** * * * It stopped unusual, and buckled and twisted in every shape" (R. p. 48), and it "knocked him from the train" (R. p. 49); "the sudden jerk and sudden stop, it knocked me off the rear end" (R. p. 61); "I was thrown right off the rear end and I hit the ground and fell toward the train" (R. p. 61) "and fell on my right side" (R. p. 62); that he "got no warning; the first intimation I got was the jar, and then I was thrown off" (R. p. 64); "I was knocked off sideways, right off the back of the train" (R. p. 67); "just knocked off" (R. p. 69); "I was knocked clean clear of the coupler and also the brake shaft" (R. p. 74). There was ample testimony that the stop made the car "whip" and "swing" and "jerk" and "wrastle around" (R. p. 61), and testimony of appellant's employee witnesses that such a stop as respondent testified to would make a rear car on such a train "whip" and "swing" and "buckle," and other testimony warranting the jury in finding that the brakes were released as the stop ended. Respondent testified (R. p. 61) to more than one impulse given him by the stopping, the jerk and the whipping, swinging, buckling and the like. He used the word "knock," to sum up the result, in the sense in which he used the same word to indicate what happened when other stops caused him to fall (R. p. 88). There is evidence that warranted the jury in refusing to accept, on the trial, the rigid meaning in which petitioner's counsel used the word "knock" in his argument below and uses it in this court (R. p. 88). Counsel for petitioner and the respondent and his counsel, at the trial, frequently used different words (R. pp. 57, 61, 64, 71, 83, 88). Respondent was badly injured (R. p. 96). Respondent testified that he "was five feet away from the wheels" (R. p. 63); his head was closer to the train (R. p. 67) and he was in the center of the track (R. p. 68).

Respondent had experienced previous "awful jolts" from sudden application of brakes and "got knocked down on top several times" in his thirty odd years service as a brakeman, but "was not knocked off" (R. p. 88). Respondent testified he never saw over six or seven such stops in all of his thirty odd years experience as a brakeman for petitioner. (He, in an answer, started to relate details, but was stopped by petitioner [R. p. 48]). The first thing respondent did after he struck the ground between the rails was to look for the wheels. Railroad men are trained "to look for the wheels" (R. p. 49). When respondent looked the train was "standing still" (R. p. 49). Respondent's condition was such that he couldn't get out from between the rails (R. p. 49). His injuries (R. pp. 13, 14, 23, 31, 32) show a condition that prevented his moving his body.

The matter of respondent's exact position on top of the rear car when he "was knocked off sideways * * * right off the back of the train, but knocked off sideways" (R. p. 67) (on cross-examination of respondent) was gone into by petitioner's counsel at length.

The record shows that cross-examining counsel first elicited the answer from respondent that he was standing on the rear car's running board at the time he was thrown from the rear car, and was "facing sideways, towards the National Stock Yards crossing," and "the train was moving east," and he was facing "I would call it northwest" (R. p. 65). Respondent's deposition had been taken, in which appellant's counsel had assumed, "for convenience," that the train was moving **south** on a straight track, whereas it was in a curve. Counsel tried to show contradiction with that deposition. The seeming contradictions are explained and shown to be due to mere differing assumptions (R. p. 66) made by petitioner's counsel which did not accord with the compass or the curving track.

Again (R. p. 69, at bottom) cross-examining counsel resumed the matter of exact position of respondent at the time he was "knocked off" of the rear car. First, he used a "writing board" with the "clip on it" and he and respondent talked about it at some length, and petitioner's counsel and respondent did considerable "indicating" of respondent's exact position and movements at the moment when the violent stop was made, **and did this in the jury's presence. Nothing in the record here now shows what the jury then saw of these things.** Again (R. p. 70) more "indications" were made in the jury's presence. This record does not show what was then "indicated" by either petioner's counsel or respondent—collaborating. Again (R. p. 71), the train which, for the purposes of a deposition, had been assumed to be going **south** (R. p. 65), was assumed **before the jury** to be going **east** (R. p. 71). Other "indications" were given, but not one of them is shown here. Other like "indications" as to position of respondent appear (R. p. 86) which do not appear here in the record, though they were before the jury. Without their being shown here, **it is not possible to know what counsel for appellant, the respondent, the trial judge and the jury** saw at the trial in that connection, however clear it was to them, **with all the "indications" before them.** The jury heard all the testimony and saw all the "indicating" that was done in its presence, and found for respondent. The trial judge heard and saw the same things, and overruled the motion for new trial.

V.

EXCERPTS FROM THE OPINION OF THE MISSOURI SUPREME COURT.

1.

The opinion of the Missouri Supreme Court (including the opinion on rehearing) appears in the transcript of record in this court, at pages 172 to 180, inclusive, and (on rehearing) at pages 230 and 231, inclusive. It is not yet printed in the Missouri Official Reports.

2.

(1) The opinion (1) states the issues (R. 173), (2) states certain facts the record shows, including (3) facts concerning "plaintiff's version" of the happening here in question, and (4) shows that plaintiff (R. 174) **"demonstrated before the jury to show how the forces applied in the stop operated."**

(2) The opinion (R. 174, 175) states petitioner's contention as to physical law and, in this connection, states, verbatim (R. 175), more of respondent's testimony as to the cause and manner of his fall (R. 175).

(3) It then properly distinguishes the cases there cited by petitioner as to physical law (R. 175).

3.

The Missouri Supreme Court's opinion then proceeds (R. 175, 176, 177) as follows:

> "Defendant's argument here is based upon the assumption that only one single force could have been applied to plaintiff. It is true that part of plaintiff's cross-examination, other than that above quoted, would be susceptible of the construction for which defendant contends. However, when all of plaintiff's testimony is considered together most favorably to

his claim (as it must be in ruling the sufficiency of his evidence to make a jury case) there is substantial evidence to show that the first force applied in the stop did operate in the direction defendant says the law of inertia would operate, but that plaintiff was not thrown forward by it because he was braced against it. It does not seem unreasonable to believe that there would be some jerk back or rebound immediately from such a sudden stop. It is true that plaintiff said it happened quickly (indicating with a snap of his fingers), but only such a sudden stop would likely have caused him to lose his balance. Therefore, we think it would be reasonable for the jury to find that there was in operation more than a single force in one direction only; that there was a sudden jerk, shake or rebound as well as a sudden slackening; that the forces applied in bringing the train to a sudden stop operated both forward and backward; and that the plaintiff would not be thrown down forward when braced against a force operating in that direction but could, because of the violence of that force, and slick condition of his footing, lose his balance so as to be thrown off the end of the car by subsequently acting forces from those movements which he described as 'buckled,' 'twisted,' 'jerked,' 'swung around' and 'wrestled around.' "

(The opinion then disposes of the matter of "slack" to which petitioner refers.)

The opinion then (R. 176, 177) proceeds:

"Moreover, in such a sudden emergency the jury might reasonably consider that the time element seemed shorter to him" (Pashea) "than it was and that he could not 'relate all the acrobatic movements performed' (Pettyjohn v. Interstate Heating and Plumbing Co. [Mo. Sup.], 161 S. W. [2d] 248, l. c. 251). In consideration of all that plaintiff said we do not think we would be justified in disregarding his testimony as in violation of physical law and impossible. We

> have often said that 'so frequently do unlooked-for results attend the meeting of interacting forces that courts should not indulge in arbitrary deductions from physical law except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other' " (citing numerous decisions).

4.

Thereupon (R. 177) the opinion fully distinguishes Gulf, Mobile & Northern R. Co. v. Wells, 275 U. S. 455 (cited here), and (R. 177, 178, 179) settles the matter of knowledge of Pashea's position on the rear car of the train.

5.

The opinion (R. 178, 179) proceeds to show that (1) there was no reason for a violent stop; (2) that petitioner's engineer was unfamiliar with the run, and (3) was, and long had been, ill, and (4) under care of a physician for a serious "nervous" condition, and proceeds:

> "Plaintiff here related what occurred and, according to his testimony, this caused him to be thrown off the end of the car. There is no dispute about the fact that he did fall from the rear car, and it was for the jury to say whether it believed his testimony as to what occurred and its effect" (the Court mentions different kinds of brakes and continues) "so far as appears there could have been a negligently violent stop by either method, especially under weather conditions shown and plaintiff's precarious position."

6.

The opinion then holds that "plaintiff's evidence made a jury issue as to the negligent violence of the stop in question."

7.

The opinion (R. 179) next discusses and disposes of petitioner's present claim that the federal courts have a rule which requires trial courts to set aside plaintiff's verdict on a theory that defendant's evidence (oral) is so strong as to erase respondent's evidence. The Court, in its opinion (R. 179), calls attention to the fact that in Hardin v. Illinois Central R. R. Co., 334 Mo. 1169, 70 S. W. (2d) 1075, it had discussed this very point, and that the opinion considered the decisions of this Court (cited in the Hardin case and cited in this court), and held that there was no such rule, after reviewing the decisions of this Court from the time of Marshall and Story to date. It also pointed out that this Court (293 U. S. 574, 55 S. Ct. Rep. 86, 79 L. Ed. 672) **denied certiorari aimed at Hardin v. Illinois Central R. R. Co.**, supra.

8.

The Missouri Court's Opinion on Motion for Rehearing (R. 230, 231) fully answered petitioner's claim in that court and in this case, that the main opinion was based upon fragmentary and self-conflicting evidence of Pashea.

The opinion on the motion for rehearing on this point says:

> "We fully agree that plaintiff's testimony must be considered as a whole, and that, if so viewed, it is so completely contradictory that one part destroys the other, then it amounts to nothing, is not substantial evidence, and will not sustain a verdict (citing cases). However, we do not think this true of plaintiff's evidence in this case, and we have explained why we so ruled. We have also explained why we do not consider plaintiff's account of the occurrence and its results to be impossible. We think the jurors could understand what it means to brace oneself against the operation of the law of inertia (whether standing in a farm wagon,

in a bus or on top of a freight car); also that the effect of a sudden stop might unbalance one so braced (especially on slippery footing) even if his bracing has prevented him from being thrown forward; and, further, that when cars are coupled together the slack in the couplings can operate both ways when there is a sudden stop. Plaintiff's account was not as perfect a description as might have been made by a professor of English, but we think it was sufficient to show that there were forces operating both ways. (In fact it is almost impossible to believe there would not be a rebound of cars coupled together from such a stop.) Furthermore, we think that the interpretation of plaintiff's descriptive terms 'shake,' 'jerked,' 'twisted,' etc., was for the jury in the light of all the facts and circumstances they believed to be true from the evidence; and that plaintiff's testimony, taken as a whole, provided a reasonable basis for their verdict. The motion for rehearing is overruled."

BRIEF FOR RESPONDENT.

I.

Reviewing Sufficiency of Evidence.

"It is the plain duty of a reviewing court, after a verdict for plaintiff, to assume the most favorable statement of plaintiff's case to be true * * *." The fact that a jury might "have drawn a different conclusion from his evidence or have disbelieved it in essential points" makes no difference.

Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 469;
Op. in Pashea v. Terminal Railroad Assn. (R. 172 et seq. and R. 230, 231) and cases cited;
Hardin v. I. C. R. R. Co., 334 Mo. 1169, 1182, and cases cited, U. S. Sup. Ct. Decs. Reviewed (certiorari denied, 293 U. S. 574);
Phoenix Ins. Co. v. Dosten, 109 U. S., l. c. 32;
Delk v. St. L. & S. F. R. R. Co., 220 U. S., l. c. 587;
Gunning v. Cooley, 281 U. S. 90, 93, 94, 95.

II.

Petitioner's Claim as to a "Federal" Rule.

Petitioner insists that there is some rule "in the federal courts" which entitled it to a directed verdict on the ground that its evidence (in its opinion) is stronger than that of respondent.

There is no such rule. The usual rule (Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 469) applies.

The matter is well treated in the Missouri Supreme Court's opinion in this case (R. 172, l. c. 179), and a great many decisions of this Court are cited therein.

Hardin v. I. C. R. R., 334 Mo. 1169, 1182 (certiorari denied, 293 U. S. 574) (U. S. Sup. Ct. Decs. Reviewed);

Parrent v. M. & O. Rd. Co., 334 Mo. 1202, 1210, 1211, 1212;
Pashea v. Terminal R. R. Assn. (R. 179).

III.

"Physical Law."

1.

It is a settled rule that "It requires an extraordinary case to authorize a court to regard sworn testimony as manifestly impossible and untrue * * * so frequently do unlooked for results attend the meeting of interacting forces that courts should not indulge in arbitrary deductions from physical law except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other."

20 Am. Jur., Sec. 1183, p. 1134, and cases cited;
Schupback v. Meshersky, 300 S. W. 465, 467;
Parrent v. M. & O. R. R. Co., 334 Mo. 1202, 1213;
Gately v. St. L. & S. F. Ry. Co., 332 Mo. 1, 14;
Murphy v. Wolferman, Inc., 148 S. W. (2d) 481, 485;
Opinion in this Pashea case, 165 S. W. (2d) 691, 694, R. 172 et seq. and R. pp. 230, 231.

2.

Another statement of the rule is that physical facts may be considered, if relevant, but "proof of such a nature cannot be construed to establish a particular conclusion, as a matter of law, **unless all the facts lead to but one conclusion to the exclusion of all others.**"

32 C. J. S., Sec. 1031, pp. 1074, 1075.

3.

When it is claimed on the trial (as it was in this case [R. 155 et seq.]), that plaintiff's evidence is utterly incredible and physically impossible, "it is as easy to demonstrate the truth before the jury as it is before the court."

Walters v. Syracuse R. T. Co., 178 N. Y. 50, 53.

IV.

1.

Evidence Not in Record Here.

(1) Certain "indications" and "demonstrations" (R. 65, 66, 67, 68, 69, 70, 71, 86) were indulged in by petitioner's counsel at the trial, aided by respondent, which showed precisely and in detail what happened to respondent when the stop was made—and how it happened. The record **here** does not show these things. The trial court and jury saw all of them. This Court has no chance to see any of them. **The trial jury and trial court both found against petitioner's claim of "impossibility" and "incredibility" and conflict with the "law of inertia."**

(2) This Court is now asked ultimately to reverse a judgment of a state court, based upon a jury verdict, approved by the trial court, and to do that by holding that there is and was no substantial evidence, and that on a record which demonstrates that **vital matters on the exact point (indications and demonstrations before the jury) are not brought here for its consideration** (R. 174, Op. of Missouri Ct. in this case) (Respondent's statement of facts, supra).

2.

"Indications" and Demonstrations at Trial Vital.

(1) On a claim of conflict with physical law, "all the necessary data for demonstration must **affirmatively** appear." The absence of the "indications" and "demonstrations" shown on the trial is highly important.

Winkler v. P & M Mining Co., 141 Wis. 244, 247.

(2) In every case where any doubt can arise, the Court's duty is to remit the question to the jury.

Walters v. Syracuse R. T. Co., 178 N. Y. 50, 53.

V.

1.

The Instinct of Self-Preservation.

The jury, from common knowledge, was authorized, and it was its duty, to interpret the evidence in the light of the instinct of self-preservation.

As to that matter this Court has held:

> "**The presumption is founded on a law of nature.** We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to its exercise in the fear of pain, maiming and death. There are few presumptions based on human experience that have surer foundation than that expressed in the instruction objected to."
>
> B. & O. R. R. Co., 191 U. S. 461, 474.

2.

Common Knowledge "Part of Jury System."

A jury has the right and duty, in their deliberations, to use their "common knowledge" and experience and "relations among men," their "common sense," their knowledge of the "natural" and "universal" instincts of men. Jurors are not required to lay these aside, nor are they able to do so. These things are a part of every juryman. **"It is a part of the jury system."**

Dunlop v. United States, 163 U. S. 486, 487 (10), 499, 500;
B. & O. v. Landrigan, 191 U. S. 461, 474, at top;
Rostad v. Portland Ry. Co., 101 Ore. 569, 578, 581;
Jenney Elec. Co. v. Branham, 145 Ind. 314, 37 L. R. A. (N. S.) 790, 793.

VI.

1.

Affirmative Evidence Not Essential.

There can be no objection to the fact that some material or essential element in a case, or a defense, is not proved by definite affirmative testimony, "but is found by the jury's verdict by" processes of reasoning from the evidence.

Van Brock v. Bank, 161 S. W. (2d) 258, 260, 261 (the quotation from **Thayer** in this opinion is pertinent).

2.

Jurors' Common Sense Part of Jury System.

Jurors are not to "abdicate their common sense or adopt any different processes of reasoning" from those they use in their affairs of consequence. "Their sound common sense * * * is the most valuable feature of the jury system" and it is that which "preserves its popularity."

Dunlop v. United States, 165 U. S. 486, 487 (10), 499, 500.

VII.

1.

The Natural Reactions of a Living Being to Be Considered.

The reactions of a living being cannot "be accounted for by every rule which might find application to an inanimate body."

Hoyt v. Met. St. R. Co., 73 App. Div. 249, 251, affirmed 175 N. Y. 502.

2.

Sudden Emergencies.

"Persons in sudden emergencies, and called upon to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases" and one who asserts he has been injured by another's negligence is entitled to have his own actions judged with "regard * * * always * * * to the exigencies of his position, indeed, to all the circumstances of the particular occasion."

U. P. Ry. Co. v. McDonald, 152 U. S. 262, 281, and cases cited.

3.

Memory of Details Not to Be Expected.

In a case involving a claim of conflict with physical law, it is the rule that one suddenly subjected to grave peril cannot be held to an exact memory and reproduction of everything that happened and that he did to extricate himself.

Pettyjohn v. I. H. & P. Co., 161 S. W. (2d) 248, 251 (Mo. Sup. Ct.);
Pashea v. Terminal R. R. Assn., 165 S. W. (2d) 691 (this case).

ARGUMENT.

I.

Petitioner's Points.

In its statement of "Reasons Relied Upon for the Allowance of the Writ" (Petition, pp. 10-15, inclusive), petitioner states the grounds upon which it relies in this Court. There are four:

1. That respondent's testimony is incredible and impossible of belief; 2. that respondent's evidence is so "self-contradictory as to destroy its probative value"; 3. that petitioner's evidence "is so destructive of respondent's evidence that this judgment cannot stand"; 4. that the opinions of the court below affirming respondent's judgment are based upon speculation and are directly contrary to respondent's evidence.

II.

Inadequacy of Petitioner's Statement.

In connection with the statement of the foregoing "Points," petitioner introduces (Petition, 11-13) certain brief references to the evidence in connection with each. The inadequacy of these is shown by our comment on petitioner's statement of facts and by "Respondent's Statement of the Facts" (both of which are found supra under section IV of this Brief, p. 3), and, also, appears from the statement of the facts as set forth by the Missouri Supreme Court in its opinion (R. pp. 172-180, inclusive, and, on rehearing, R. pp. 230, 231).

Petitioner slightly elaborates its statement of facts in its "Argument," but achieves no appreciable advance toward adequacy. It is requisite that all the facts be before this Court in this proceeding. Nothing less can suffice for a determination of the questions petitioner brings forward. Petitioner's "Reasons" do not add or prove anything.

III.

Petitioner's Assumptions.

At pages 22-35 of its brief in this court, petitioner discusses the "law of inertia."

1.

Petitioner, in that discussion, makes some unwarranted assumptions:

Throughout its argument it, by the most necessary implication, assumes that a living and active human being is affected, in all instances and particulars, by "the law of inertia" exactly as an inanimate object would be affected by it. (See Hoyt v. Met. St. R. Co., 73 App. Div. 249, 251, affirmed 75 N. Y. 502.)

This assumption is unjustified and is further unwarranted because itself opposed to the fundamental instinct of self-preservation and to common knowledge. Every man and juror knows the struggle that is initiated instantly when serious peril suddenly menaces a man. It is common knowledge that he exerts immediately the utmost efforts of which he is capable in order to save himself. Cases cited supra from this Court establish this doctrine.

2.

Petitioner assumes that every man assailed by imminent peril, which he instinctively and instantly fights with all his strength and vigor, and who, nevertheless, is cruelly and disablingly hurt, must be held by this Court to remember at his peril every detail of the cause of his injury and his struggles to avert peril and then be able to detail them all with a perfection of diction which will satisfy cross-examining counsel in an action for redress. That is not the law (Pettyjohn v. I. H. & P. Co., and the Missouri Supreme Court's opinion in this case. Both cited supra).

3.

Petitioner's assumed meaning of "knock" is not justified. Petitioner ascribes to the word "knock" a too strict and rigid meaning. Its argument depends upon an acceptance by this Court of that rigid meaning as a thing established as a matter of law. The fact is that, at the trial, respondent, his counsel, and petitioner's counsel, himself, all used other words to describe the manner of respondent's precipitation from the car (R. pp. 57, 61, 64, 71, 83, 86, 88, and others). Respondent testified he was "knocked" from the car, was "thrown" from the car and "fell" from the car, "went down" from the car. Each meant, to him, the same thing, i. e., that the cause of his **descent** from the car was the negligently violent stop and the train of things it bred. They also meant the same to petitioner's counsel at the trial.

4.

Absence of Evidence From Record.

Petitioner assumes that all the facts developed before the jury were in the record in the Supreme Court of Missouri and are in the record here. Neither is the case. The record here shows that petitioner's counsel, at the trial, with the collaboration of respondent, respecting the very matter of the precise position, stance, preparation for a ((careful) stop, in case one was to be made at this "regular" stopping place, produced a "writing board" and "clip," and numerous things were discussed and **demonstrated before the jury** (R. pp. 69, 70, 71, 86). Not any of these indications and demonstrations are before this Court. Nor can what they said and did be understood without them.

5.

Petitioner (Petitioner's Brief, p. 24) argues that the train was not "in a curve" (when both sides proved it was) and then assumes that it "makes no difference if it was." Benson (petitioner's brakeman) testified the train was in a "rather steep curve" when respondent was hurt (R. 109), and respondent testified likewise (R. 61, 66, 47). It was about a rear car on a train "in a curve" that respondent was testifying when he said the rear car "jerked and swung around and wrastled around" (R. 61). (See R. 130, 140.) Here petitioner has, by implication, offered "physical law" of its own for this Court's consideration.

IV.

The Matter of "Bracing Himself."

Petitioner (p. 24 et seq. of its "Petition and Brief") argues the matter of the "law of inertia."

1. It begins (p. 24) by attempting to rid itself of respondent's testimony concerning his "bracing himself." It complains that respondent "does not say what he means by that" and argues that he must have meant that he "braced himself" **after the stop was made.** Respondent's testimony requires no such translation (R. pp. 60, 61). The train was approaching a point where it usually made a "regular stop," St. Clair avenue. Sometimes "they pull the whole train in" (R. p. 78). Respondent was "bracing" himself against a stop, if one were made (R. pp. 60, 61). That would require a bracing (or leaning) back from the direction of movement. The shock of the stop "swung" respondent towards the front," etc.

2. Now it was respecting this very matter, which petitioner and its counsel now deem so vital, that all the "indications" and demonstrations, at considerable length, were placed before the trial court and jury (R. pp. 69, 70,

71, 86). These disclosed the whole matter, in detail, to the trial court and jury. Both found against petitioner's present claim.

3. It does not become petitioner now to complain that respondent did "not say what he means" by what he and petitioner's counsel said and "demonstrated" before the jury, in detail, nor, for the same reason, is it permissible for petitioner to substitute here what it now **says here** in explanation of what its counsel **showed to the trial court and jury on the trial. What was shown then is not here now.**

V.

Another Assumption.

Petitioner declares that the "law of inertia" (Pet. and Brief, p. 25) could not have been affected except by "unintention" or "as a result of some natural force." It then launches itself upon an effort to exclude all other "natural laws."

Here again petitioner ignores the fact that respondent is a living man and not an inanimate object; that the instinct of self-preservation is the most universal instinct and that peril instantly sets it in motion and that the jury, according to this Court, had the right to find that respondent was moved by it and immediately sprang to defense of life and limb with all the strength and power he possessed, and that the record does not contain the **demonstrations of the details of the actual event just as it happened.**

VI.

Petitioner's Decisions on Physical Law.

1.

Petitioner cites decisions applying on rule as to physical laws. Dunn v. Alton R. Co., 340 Mo. 1037, and Daniel v. K. C. Elec. Co., 177 Mo. App. 280, were the ones cited in the

Missouri Supreme Court. They are well disposed of in the opinion of that Court (R. p. 175). In Dunn v. Alton it will be noted that Dunn's testimony told everything, got everything wrong, excluded, in fact, any effort to save himself by grasping the various things about him, in front, behind and on each side of him, was not on a slippery-topped freight car, but in the vestibuled passageway between passenger cars. He, too, was an experienced railroader.

2.

The case in 177 Mo. App. 280 adds nothing, as the Missouri court held in this case.

3.

The next case petitioner cites on this matter is Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215 (Kansas City Ct. of App., Johnson, J.). It is enough to say that on the essential point the facts of that case are quite unlike the facts of this Pashea case—and none of the vital facts were omitted from the appellate record there and nothing in plaintiff's evidence there left anything whatever in doubt on the point.

4.

Rome Ry. & Light Co. v. Keel, 3 Ga. Appeals 769. This case distinguishes itself. The case was up from a ruling against defendant **on a demurrer to the petition.** There was no evidence for consideration, no modifying circumstances, not a hint of conditions like those in this case, nothing showing, by demonstrations, just what happened and how it happened, as in this case. Neither did the Court discuss the **change in the rate of diminution of speed, to which one riding a train is adjusted, when the brakes are released.** The effect of a sudden change in **the rate of diminution of speed** finds the car riders not ready for an instantaneous restoration of a nondiminishing speed.

5.

It is to be noted that the Missouri Supreme Court **in this case** and in Dunn v. Alton, 340 Mo. 1037, 104 S. W. (2d), l. c. 314 (1, 2), **held** that the first impulse upon a sudden stop would be **toward the engine,** and that a **releasing of the brakes would throw the car rider away from the engine.** Petitioner takes no heed of this. Of course, this case has many more things in the evidence (in the record **and not in the record**) than any case cited by petitioner.

6.

The other decision petitioner now cites is so unlike the case at bar in its facts that comment is unnecessary.

VII.

Opinion Not Based on Speculation.

1.

Paragraph III (of petitioner's brief, p. 35) contains no new matter and requires no additional comment.

2.

"Speculation."

The "Argument" in paragraph IV of petitioner's brief (pp. 35 et seq.) is of the same character. In that paragraph petitioner reasserts its claim that the Missouri Supreme Court's opinion (R. pp. 172 to 180), and on rehearing (R. pp. 230, 231) is "based wholly upon speculation and conjecture."

3.

Previous pages of this brief and argument disprove the soundness of this assertion both as a matter of fact and as a matter of law. The Missouri Supreme Court's opinion does both of the same things. This part of petitioner's

"Argument" does disclose that petitioner still relies upon the method of selecting mere fragments of respondent's testimony and ignoring all the rest and all the other evidence in the case, ignoring the vital "demonstrations" in evidence but not in the record, and also treating the physical law rule as if it made out petitioner's defense, if some possible factual theory could be worked out, from parts of the record thus emasculated, which tended to point in a direction favorable to petitioner.

On this matter also petitioner's brief and argument disclose that it is not able to bring itself to concede that it was and is under the necessity of proving, **beyond a doubt, that respondent's evidence was utterly incredible, and that it was wholly impossible that respondent could have fallen from the end of the car as a result of what happened because of the sudden and violent stop—of which sudden and violent stop there was ample evidence, as petitioner now seems to concede in this court.**

4.

Petitioner, on page 43 of its brief and argument, cites decisions. The opinion of the Missouri Supreme Court in this case (R. p. 179) takes up these decisions and refers to Hardin v. I. C. R. Co., 334 Mo. 1169, 70 S. W. (2d) 1075 (certiorari denied 293 U. S. 574), in which all but one were fully considered and petitioner's present contention denied. The additional decision cited by petitioner (283 U. S. 209, 215, et seq., on p. 43 of its brief) has no application here.

VIII.

Steele v. Railroad, 265 Mo. 97.

Petitioner, in its brief (p. 36), cites Steele v. Railroad, 265 Mo. 97, 117. That decision is illustrative of the other citations made in the same connection. The applicability of the Steele case was denied (R. p. 230) in the Missouri

Court's opinion on rehearing in this case. It is obvious it cannot apply. In the Steele case the only testimony on the issue as to liability was that of plaintiff. His testimony was utterly destructive of his case. Later recalled, he simply gave diametrically contradictory testimony on the point. He made no explanation whatever of this change. There was no other testimony on the point and no proof of any facts or circumstances tending to show liability. The Steele case rests upon that fact. It does not resemble this Pashea case.

IX.

Conclusion.

1.

In Van Brock v. Bank, 161 S. W. (2d) (Mo. Sup. Ct.) 258, l. c. 260, 261, the opinion quotes and approves a quotation from Mr. Thayer as follows:

> " 'It is the office of jurors to adjudge upon their evidence'; so the Court is reported to have said in Littleton's case. That remark brings out a fundamental point, so obvious as hardly to need stating, namely, that it is no test of a question of fact that it should be ascertainable without reasoning and the use of the 'adjudging' faculty; much must be conceived of as fact which is invisible to the senses, and ascertainable only in this way. Of course, by the judges this function of reasoning has constantly been exercised; the sentence just quoted makes it apparent that it must also be discharged by juries. We are not then to suppose that a jury has found all the facts merely because it has found all that is needed for the operation of the reasoning faculty; the right inference or conclusion, in point of fact, is itself a matter of fact, and to be ascertained by the jury. As regards reasoning, the judges have no exclusive office; the jury also must perform it at every step."

(1) In the performance in this case of this identical duty the trial jury of twelve men found against petitioner and the trial judge overruled petitioner's demurrer to the evidence and overruled its motion for new trial.

(2) Petitioner now asks this Court, in the performance of the same function, to hold, on a record **obviously containing only part of the evidence, that the whole of the evidence before the trial jury and trial court was, beyond a reasonable doubt, utterly incredible and impossible of belief.**

2.

An annotation, which includes the examination of a multitude of decisions, appears in 21 A. L. R. 141, pp. 145, 146, and summarizes the "laws of nature" rule as follows:

> "Courts will reject evidence which is clearly contrary to well known and undisputed laws of physics and mechanics, but generally are cautious in applying the rule—**at least where the testimony does not contravene such laws beyond any reasonable doubt.** And it may properly be conceded that under some circumstances the right to reject evidence is proper, as where it is contrary to nature's undisputable laws. **It must be borne in mind, however, in the first place, that there is no presumption that judges are any better informed than the members of juries as to the working of the laws of nature.** But admitting the superior capacity of the courts to deal with scientific principles in the abstract, they might well hesitate, as they often have, to reject on the ground that it is contrary to scientific principles, the testimony of witnesses, especially if disinterested, purporting to state an actual fact, **for the reason that there may have been some fact or circumstance not apparent that, if shown, would have reconciled the testimony of the witness with the scientific principles applicable to the subject.** To throw out the testimony of witnesses involves,

first, the correctness of the court's understanding of the scientific principles applicable to the question involved; **and, second, the assumption that all the facts which could affect the question are before the court.** Ordinarily, of course, the courts are entitled to base their decisions upon the showing made, but if the court undertakes to go outside and test the evidence by scientific principles, it would seem that it cannot properly close its eyes to the possibility that there may have been a fact or circumstance, not **disclosed,** which would reconcile the testimony of the witness with scientific principles—at least, unless the facts and circumstances **as shown** are such as reasonably to repel the existence of any other fact or circumstance which could affect the matter."

(In a jury case the jury are to determine "reasonability." The word "reasonably" should be "conclusively" in order to apply at this late day.)

The absence of "other facts and circumstance" is not merely inferable, generally, in this case. The record here affirmatively shows **the actual absence from the record of evidence affirmatively shown to have been before the jury and trial court,** as heretofore pointed out several times.

Respondent respectfully prays that the petition for certiorari be denied.

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